United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-1110

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v

ANTHONY STASSI,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District Of New York

Appellant's Appendix

JULIA P. HEIT
Attorney for Appellant
Anthony Stassi
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DOCKET SHEETS

D. C. Form No. 100

CRIMINAL DOCKET

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	Harry C. Batchelder, S
ANTHONY STASSI	
	For Defendant:

ABSTRACT OF COSTS (07)	AMOUNT		CASH RECEIVED AND DISBURSED			
			DATE	NAME	RECEIVED	DIS
Fine,						
Clerk,						
Marshal,						
Attorney,						
Commissioner's Court,						
Witnesses,						
21:173,4.						
Receipt of Heroin knowing it to						
be imported.(Ct.2)						
Consp. so to do.(Ct.1)						

DATE	PROCEEDINGS
1-30-73	Indictment filed and ordered sealed until 7-2-73 -- Ryan, J.
4-27-73	...A ordered. -- Indictment not to be unsealed until 9-15-73 -- Wyatt, J. B/W
9-10-73	Govt's application that indictments be sealed until 11-15-73 is gr Duffy, J.
1-15-74	Adjourned to March 18,1974. Metzner,J.
3-18-74	Indictment not to be unsealed before 4-22-74. Motley,J.
4-22-74	Not to be unsealed before 5/31/74. Pierce,J.
7-3-74	To remain sealed, not to be unsealed before 8-3-74. Ward,J.
8-5-74	Not to be unsealed before 9-5-74. Stewart,J.

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
2-20-74	INDICTMENT ORDERED UNSEALED. SO ORDERED. CARTER,J.		
2-30-74	Deft. not present (no atty.) court directs a plea of not guilty be entered. Griesa,J. Case assigned to Knapp for all purposes.		
/6/75	Filed papers from Northern Dist. of Georgia: waiver of removal hearing; order of removal; record of proceedings; appearance bond; order specifying methods and conditions of release; public service mutual insurance co. bond		
2/4/75	Filed deft. A. Stassi's motion re: discovery of materials pertaining to or resulting from electronic surveillance.		
2/4/75	Filed deft. A. Stassi's motion re: early disclosure of Jencks Act Material 18:3500 and memo. of law in support thereof.		
2/4/75	Filed affdvt. of Mark J. Kadish re: motion for speedy trial,etc.		
2/4/75	Filed deft. A. Stassi's motion re: speedy trial.		
2/4/75	Filed deft. A. Stassi's memo. of law re: support of motion for speedy trial		
2/4/75	Filed deft. A. Stassi's memo. of law in support of motion to dismis for lac of speedy prosecution.		
2/4/75	Filed deft. A. Stassi's motion re: dismiss for lack of speedy trial.		
2/4/75	Filed deft. A. Stassi's motion re: "mail cover".		
2/4/75	Filed deft. A. Stassi's motion re: bill ofparticulars.		
2/4/75	Filed deft. A. Stassi's memo.of law re: support of motion for bill of particulars.		
2/4/75	Filed deft. A. Stassi's motion re: discovery and inspection.		
2/4/75	Filed deft. A. Stassi's memo. of law re: support of motion for discovery.		
2/4/75	Filed deft. A. Stassi's memo. of law re: surveillance or eavesdropping.		
/4/75	Deft. (atty. present) pleads not guilty. 10 days for motion. Bail condition set by the U.S.D.C. in Atlanta, Ga ($25,000. cash or surety) bail limits, Ga. N.Y. & Fla.) cont'd. except that the limits are extended to include the entire Eastern Seaboard. Knapp,J.		
-19-75	Filed Govt.'s affdvt. re: support of Govt.'s request the return date of deft.'s motion regarding the alleged lack of speedy prosection,etc.		
-27-75	Filed deft. A. Stassi's notice of motion re: sanctions.		

DATE	PROCEEDINGS
02-28-75	Filed Govt.'s affdvt. re: opposition to motion to produc. Jenk's Act material.
02-28-75	Filed Govt.'s memo. of law in opposition to precipitious disclosure of 3500 material.
03-03-75	Filed Govt.'s affdvt. in opposition to motionfor sanctions and motion to dismiss for lack of speedy trial.
03-03-75	Filed Govt.'s memo. of law re: opposition to deft.'s motion to dismiss for lack of speedy trial.
03-04-75	Filed memo. of law in response to deft.'s motion concerning mail cover.
03-05-75	Filed Govt's. memo. of law in response to deft.'s motion for discovery.
03-13-75	Deft. (atty. present) deft.'s motion to enlarge bail limits to include Nice, France is granted only on condition that deft. post an additional surety bond in the amount of $20,000. secured by $2,000. cash, said additional surety bond to be exonerated and cash returned only upon deft.'s return to the U.S. Knapp,J. mn
04-08-75	Filed deft.'s notice of motion and motion re: dismissal.
04-08-75	Filed deft.'s notice of motion and motion re: disuovery,etc.
04-08-75	Filed deft.'s notice of motion and motion re: impound tape recordings,etc.
04-08-75	Filed deft.'s notice of motion and motion re: inspection,disuover
04-08-75	Filed deft,'s memo. of law re: support motionfor discovery and inspection.
04-08-75	Filed deft.'s memo. of law re: support motion to impound tapes,et
04-08-75	Filed deft.'s memo. of law re: support of motion to inspection of Grand Jury Minutes.
04-08-75	Filed deft.'s memo. of law re: support of motion to dismiss.
04-08-75	Filed affdvt. of Mark J. Kadish.of
04-08-75	Deft.(atty. present) motion to dismiss-denied., motion for disco -granted, motion to extend bail limits to include Europe wit increasing bail is granted. Knapp,J.
04-15-75	Filed memo. of law of Govt. in opposition to deft.'s motions to dismiss for failure to disclose and to impound electronic surveillance materials.
04-15-75	Filed Govt.'s memo. of law in opposition to deft.'s motion for inspection and discovery of Grand Jury Materials.

109 Criminal Continuation Sheet

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT JUDGE KNAPP 75 CRIM. 5(

TITLE OF CASE

THE UNITED STATES

vs.

1. JOSEPH STASSI, a/k/a Joe Rogers- 1-5
2. ANTHONY STASSI- 1-5
3. JEAN CLAUDE OTVOS-1-5
4. WILLIAM SORENSON, a/k/a Bubby -1-5
5. CARMINE CONSALVO -1-5
6. CHARLES ALAIMO- 1-5
7. JEAN GUIDICELLI, a/k/a the uncle-1

ATTORNEYS

For U.S.:

James E. Nesland, AUS
791-0071

For Defendant:

STATISTICAL RECORD		DATE	NAME OR RECEIPT NO.	REC.
(07)				
J.S. 2 mailed	Clerk			
J.S. 3 mailed	Marshal			
Violation	Docket fee			
Title 21				
Sec. 846&963				

Consp. to viol. Fed. Narco. Laws.(Ct.1)
21:173&4 Import. & sale of heroin in the U.S.(Cts2&3)
21:812,841(a)(1),(b) Distr. & possess. w/intent to distr. Heroin, I. (Cts4&5)
(Five Counts)

DATE	PROCEEDINGS
5-23-75	Filed indictment. (Superseding 75 Cr395 and referred to Knapp, J. Defts.Consalvo & Alaimo, B/Ws ordered. Gagliardi,J.
06-19-75	Filed Govt. affdvt. re: opposition to A. Stassi's motion for discovery,etc.(filed in 75 Cr. 395)
06-25-75	Filed two (2) envelopes containging certain materials. Ordered by the Court on 6/20/75.-Knapp,J.
06-24-75	Filed OPINION # 42661...Accordingly, the govt's motion for protective order denying discovery of the statements o through consensual eavesdroppings will be granted. if the informant does testify as a witness, of it the versations should in any other way become relevant during the course of the trial, the govt. will be ordered to over transcripts of the conversations to the deft, etc.

-over-

07-01-75 Filed OPINION #42706- ...deft. Anthony Stassi seeks to dismiss all indictments against his primarily on the ground that his fifth and sixth amendment rights to a speedy trial have been violated. The deft.'s motions will be denied. Knapp,J. mn

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE KNAPP 75 CRIM. 395

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
vs.	James E. Nesland, AUSA 791-0071
1. JOSEPH STASSI, a/k/a Joe Rogers-1-5 2. ANTHONY STASSI-1-5 3. JEAN CLAUDE OTVOS-1-5 4. WILLIAM SORENSON, a/k/a Bubby-1-5 5. JEAN GUIDICELLI, a/k/a Uncle-1	For Defendant:

(07) STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk					
J.S. 3 mailed	Marshal					
Violation	Docket fee					
Title 21 Sec. 846,173,4;812,841(a)(1),(b). Consp. to viol. Fed. Narco. Laws.(Ct.1) Import & sale of narcotic drugs.(Cts.2&3) Distr. & possess. w/intent to distr. Heroin. I.(Cts.4&5) (Five Counts)						

DATE	PROCEEDINGS
4-17-75.	Filed indictment. (Superseding 73Cr 405, referred to Knapp, J.)
04-17-75	Filed Govt.'s affdvt. for writ of habeas corpus ad pros. for Joseph Stassi ret: 4-21-75.
04-17-75	Filed Govt.'s affdvt. for writ of habeas corpus ad pros. for William Sorenson ret: 4-21-75.
04-17-75	Filed Govt.'s affdvt. for writ of habeas corpus ad pros. for Jean Claude Otvos ret: 4-21-75.
4-21-75	Case referred to Knapp, J. for superseding indictment. Pierce, J.
04-21-75	Filed deft, A. Stassi's notice of motion for severance of deft.

-over-

DATE	PROCEEDINGS
4-21-75	Deft. Sorenson & atty. (Howard Schwinger, Esq.) present. Deft. arraigned & pleads not guilty to all counts. Bail set in theamount of $5,000. cash or surety. 10 days for motions.
	Deft. Anthony Stassi (atty. Mark Kadish present) Deft. arraigned & pleads not guilty to allcounts. Bail set in indictment 73 Cr. 405 cover this indictment. Knapp,J.
4-24-75	Filed writ of habeas corpus ad pros. for Jean Claude Otvos. Writ returned unexecuted, inmate no longer at USP-Atlanta. Paroled on 3-3-75. to INS for possible deportation.
4-24-75	Filed writ of habeas corpus ad pros. for Jean Claude Otvos. Writ satisfied 4-21-75 Knapp,J.
4-25-75	Filed deft. A. Stassi's motion re: order permitting all motions heretofore filed in indictment No. 405 to be made a part of the pre-trial record in the superseding indictment.
4-25-75	Filed deft. A. Stassi's memo. oflaw in support of motion to sever.
4-29-75	Anthony Stassi- filed papers orig. filed with magistrate: appearance bond, order specifying methods and conditions of release, waiver of removal hearing & order of removal
4-29-75	Filed ORDER that all pre-trial motions heretofore filed by deft. Anthony Stassi in indictment 73 Cr. 405 are hereby made a part of the pre-trial record inthe instant indictment. This order in no way is meant to preclude the deft. Anthony Stassi from filing further pre-trial motions to the instant indictment. Knapp,J. mn
4-24-75	Deft. Joseph Stassi(atty. present) deft. arraigned and pleads not guilty to all counts. Deft. released on own recognizance. Knapp,J.

JV:emw

INDICTMENT 73 CR 405

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-v- :

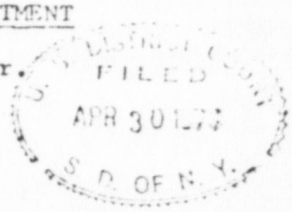
ANTHONY STASSI, :

Defendant. :

----------x

INDICTMENT

73 Cr.



The Grand Jury charges:

1. From on or about the 1st day of May, 1970 and continuously thereafter up to and including the 15th day of October, 1970, in the Southern District of New York, ANTHONY STASSI, the defendant, and others to the Grand Jury unknown and known, including Michel Mastantuono, Andre Arioli, Andre Andreani, a/k/a Andre, and Jacques Bec, named herein as co-conspirators and not as defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code.

2. It was part of said conspiracy that the said defendant and co-conspirators unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

In pursuance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about May, 1970, co-conspirator Michel Mastantuono ordered a Citroen automobile in Paris, France.

2. In or about August, 1970, co-conspirator Michel Mastantuono drove a Citroen automobile from Biarritz to Paris, France.

3. In or about September, 1970 co-conspirator Michel Mastantuono drove a Citroen automobile to Manhattan, New York City.

4. In or about September, 1970, co-conspirator Michel Mastantuono met co-conspirator Jacques Bec at the Metropole Bar in Manhattan, New York City.

5. In or about September, 1970, co-conspirators Michel Mastantuono and Jacques Bec drove in a Citroen automobile to the vicinity of Fifth Avenue, Manhattan, New York City.

6. In or about September, 1970, co-conspirator Andre Andreani, a/k/a Andre, walked out of a coffe shop and met the defendant ANTHONY STASSI in Manhattan, New York City.

7. In or about September, 1970, co-conspirator Jacques Bec gave $40,000 to co-conspirator Michel Mastantuono in Manhattan, New York City.

(Title 21, United States Code, Sections 173 and 174).

SECOND COUNT

The Grand Jury further charges:

In or about September, 1970, in the Southern District of New York, ANTHONY STASSI, the defendant, unlawfully, wilfully and knowingly did receive, conceal and facilitate the transportation and concealment of a narcotic drug, to wit, approximately 40 kilograms of heroin after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs may find necessary to provide for medical and legitimate uses only, is prohibited.

(Sections 173 and 174, Title 21, United States Code)

Edward J. Lopez
Foreman

Whitney North Seymour, Jr.
WHITNEY NORTH SEYMOUR, Jr.
United States Attorney

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By _____
Deputy Clerk

JN:wp INDICTMENT 75 CR 395

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA :

- v - :

JOSEPH STASSI, :
a/k/a Joe Rogers,
ANTHONY STASSI,
JEAN CLAUDE OTVOS,
WILLIAM SORENSON,
a/k/a Bubby,
JEAN GUIDICELLI,
a/k/a, the Uncle,

Defendants. :

- -x

75 CRIM. 395

INDICTMENT

S 75 Cr.

COUNT ONE

The Grand Jury charges:

1. On or about the 1st day of January, 1970, and continuously thereafter up to and including the 30th day of December, 1972, in the Southern District of New York, and elsewhere, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS, WILLIAM SORENSON, a/k/a Bubby, and JEAN GUIDICELLI, a/k/a, the Uncle, the defendants, and others to the Grand Jury known and unknown, including Mario Perna, Anthony Verzino, Michel Mastantuono, Andre Arioli, Andre Andreani, Jacques Bec, and Jean Cardon named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate, prior to May 1, 1971, Sections 173 and 174 of Title 21, United States Code, and, on and after May 1, 1971, to violate Sections 812, 841 (a)(1), 841 (b)(1)(A), 951 (a)(1) and 952 of Title 21, United States Code.

2. It was part of said conspiracy that prior to May 1, 1971, the said defendants and co-conspirators, unlawfully, wilfully, knowingly and fraudulently would import and bring

into the United States large amounts of narcotic drugs from and through France, Canada, and other countries to the Grand Jury unknown, in violation of Sections 173 and 174 of Title 21, United States Code.

3. It was further a part of said conspiracy that prior to May 1, 1971, the said defendants and co-conspirators unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

4. It was further a part of said conspiracy that on and after May 1, 1971, the said defendants and co-conspirators unlawfully, wilfully and knowingly would import into the United States from a place outside thereof Schedule I narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 951 (a)(1) and 952 of Title 21, United States Code.

5. It was further a part of said conspiracy that on and after May 1, 1971, the said defendants and co-conspirators unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841 (a)(1) and 841 (b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

1. In or about February and March, 1970, defendants JOSEPH STASSI, a/k/a Joe Rogers, JEAN CLAUDE OTVOS and co-conspirators Mario Perna and Anthony Verzino had meetings in the Federal Penitentiary, Atlanta, Georgia, and agreed to arrange for the importation of heroin from France to the United States.

2. In or about March, 1970, defendant JOSEPH STASSI, a/k/a Joe Rogers, recruited defendant ANTHONY STASSI to make arrangements for importing heroin from France and distributing said heroin in the United States.

3. In or about March, 1970, defendant WILLIAM SORENSON, a/k/a Bubby, while still incarcerated at the Federal Penitentiary, in Atlanta, Georgia, met with co-conspirators Mario Perna and Anthony Verzino and agreed to assist defendant ANTHONY STASSI in importing and distributing heroin.

4. In or about May, 1970, defendant ANTHONY STASSI met with defendant JEAN GUIDICELLI, a/k/a "the Uncle," and negotiated for the importation of approximately 120 kilograms of heroin from France to New York City.

5. In or about May, 1970, co-conspirator Michel Mastantuono ordered a Citroen automobile in Paris, France.

6. In or about September, 1970, co-conspirator Michel Mastantuono drove a Citroen automobile from Biarritz to Paris, France, where it was transported to Montreal, Canada.

7. In or about September, 1970, co-conspirator Michel Mastantuono drove a Citroen automobile from Montreal,

Canada, to New York, New York.

8. In or about September, 1970, co-conspirators Michel Mastantuono and Jacques Bec drove a Citroen automobile to Fifth Avenue, New York, New York, to meet co-conspirator Andre Andreani.

9. In or about September, 1970, co-conspiractor Andre Andreani met defendant ANTHONY STASSI in New York, New York.

10. In or about September, 1970, co-conspirator Michel Mastantuono drove a Citroen automobile to a garage escorted by defendants ANTHONY STASSI, WILLIAM SORENSON, a/k/a Bubby, and others.

11. In or about September, 1970, co-conspiractor Michel Mastantuono and Andre Andreani removed approximately 40 kilograms of heroin from a Citroen automobile and delivered it to defendants WILLIAM SORENSON and ANTHONY STASSI in Westchester County, New York.

12. In or about June, 1971, in Montreal, Canada, co-conspirators Michel Mastantuono and others removed approximately 70 kilograms of heroin from a Fiat automobile and concealed it in a stationwagon.

13. In or about June, 1971, co-conspirator Jean Cardon drove a stationwagon to New York, New York.

14. In or about June, 1971, co-conspirator Michel Mastantuono drove a stationwagon to New Jersey and removed approximately 70 kilograms of heroin for delivery to defendants ANTHONY STASSI, WILLIAM SORENSON, a/k/a Bubby and others.

(Title 21, Sections 173 and 174, United States Code;
Title 21, Sections 812, 841, 846, United States Code.)
(Title 21, Section 963, United States Code.)

COUNT TWO

The Grand Jury further charges:

In or about September, 1970, in the Southern District of New York, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS and WILLIAM SORENSON, a/k/a Bubby, the defendants, unlawfully, wilfully, knowingly and fraudulently did import and bring into the United States contrary to law a narcotic drug, to wit, approximately 40 kilograms of heroin, in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code; Title 18, Section 2, United States Code.)

COUNT THREE

The Grand Jury further charges:

In or about September, 1970, in the Southern District of New York, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS, and WILLIAM SORENSON, a/k/a Bubby, the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 40 kilograms of heroin, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and

Dangerous Drugs finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code; Title 18, Section 2, United States Code.)

COUNT FOUR

The Grand Jury further charges:

In or about June, 1971, in the Southern District of New York, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS, and WILLIAM SORENSON, a/k/a Bubby, the defendants, unlawfully, knowingly and intentionally did import a Schedule I narcotic drug controlled substance, to wit, approximately 70 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

COUNT FIVE

The Grand Jury further charges:

In or about June, 1971, in the Southern District of New York, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS, and WILLIAM SORENSON, a/k/a Bubby, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 70 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

FOREMAN

PAUL J. CURRAN
United States Attorney

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By
Deputy Clerk

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812, 841(a)(1)
States Code.

Attorney.

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JUDGE KNAPP.

4-24-75 Case reassigned to Knapp J. for Supervising & Instr.

Present

Apr. 21, 1975 Dft. Lorenzo + atty. (Howard Schwinger, Esq.) present. Dft. arraigned + pleads not guilty to all counts. Bail set in the amount of $5,000 cash or surety. 10 days for motions.

Dft. Anthony Stassi + atty. (Louis Kadish, Esq.) present. Dft. arraigned + pleads not guilty to all counts. Bail set in Indictment 73 Cr. 405 shall cover this Indictment.

Knapp, J.

Apr. 24, 1975 Dft. Joseph Stassi + atty. present. Dft. arraigned + pleads n. g. to all counts. Dft. R.O.R.

Knapp, J.

SOUTHERN DISTRICT OF NEW YORK

75 CRIM. 502

UNITED STATES OF AMERICA,

-v-

JOSEPH STASSI,
a/k/a Joe Rogers,
ANTHONY STASSI,
JEAN CLAUDE OTVOS,
WILLIAM SORENSON,
a/k/a Bubby,
CARMINE CONSALVO,
CHARLES ALAIMO, and
JEAN GUIDICELLI,
a/k/a, the Uncle,

Defendants.

INDICTMENT

COUNT ONE

The Grand Jury charges:

1. On or about the 1st day of January, 1970, and continuously thereafter up to and including the 30th day of December, 1972, in the Southern District of New York, and elsewhere, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS, WILLIAM SORENSON, a/k/a Bubby, CARMINE CONSALVO, CHARLES ALAIMO, and JEAN GUIDICELLI, a/k/a the Uncle, the defendants, and others to the Grand Jury known and unknown, including Mario Perna, Anthony Verzino, Michel Mastantuono, Andre Arioli, Andre Andreani, Jacques Bec, and Jean Cardon named herein as co-conspirators but not as defendants, unlawfully, wilfully and knowingly combined, conspired, confederated and agr together and with each other to violate, prior to May 1, 1 , Sections 173 and 174 of Title 21, United States Code, and, on and after May 1, 1971, to violate Sections 812, 841 (a)(1), 841 (b)(1)(A), 951 (a)(1) and 952 of Title 21, United States Code.

2. It was part of said conspiracy that prior to May 1, 1971, the said defendants and co-conspirators, unlawfully, wilfully, knowingly and fraudulently would import and bring

and through France, Canada, and other countries to the Grand Jury unknown, in violation of Sections 173 and 174 of Title 21, United States Code.

3. It was further a part of said conspiracy that prior to May 1, 1971, the said defendants and co-conspirators unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

4. It was further a part of said conspiracy that on and after May 1, 1971, the said defendants and co-conspirators unlawfully, wilfully and knowingly would import into the United States from a place outside thereof Schedule I narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 951 (a)(1) and 952 of Title 21, United States Code.

5. It was further a part of said conspiracy that on and after May 1, 1971, the said defendants and co-conspirators unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841 (a)(1) and 841 (b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York, and elsewhere:

1. In or about February and March, 1970, defendants JOSEPH STASSI, a/k/a Joe Rogers, JEAN CLAUDE OTVOS and co-conspirators Mario Perna and Anthony Verzino had meetings in the Federal Penitentiary, Atlanta, Georgia, and agreed to arrange for the importation of heroin from France to the United States.

2. In or about March, 1970, defendant JOSEPH STASSI, a/k/a Joe Rogers, recruited defendant ANTHONY STASSI to make arrangements for importing heroin from France and distributing said heroin in the United States.

3. In or about March, 1970, defendant WILLIAM SORENSON, a/k/a Bubby, while still incarcerated at the Federal Penitentiary, in Atlanta, Georgia, met with co-conspirators Mario Perna and Anthony Verzino and agreed to assist defendant ANTHONY STASSI in importing and distributing heroin.

4. In or about May, 1970, defendant ANTHONY STASSI met with defendant JEAN GUIDICELLI, a/k/a "the Uncle," and negotiated for the importation of approximately 120 kilograms of heroin from France to New York City.

5. In or about May, 1970, co-conspirator Michel Mastantuono ordered a Citroen automobile in Paris, France.

6. In or about September, 1970, co-conspirator Michel Mastantuono drove a Citroen automobile from Biarritz to Paris, France, where it was transported to Montreal, Canada.

7. In or about September, 1970, co-conspirator Michel Mastantuono drove a Citroen automobile from Montreal,

JN:ko Canada, to New York, New York.

8. In or about September, 1970, co-conspirators Michel Mastantuono and Jacques Bec drove a Citroen automobile to Fifth Avenue, New York, New York, to meet co-conspirator Andre Andreani.

9. In or about September, 1970, co-conspirator Andre Andreani met defendant ANTHONY STASSI in New York, New York.

10. In or about September, 1970, co-conspirator Michel Mastantuono drove a Citroen autumobile to a garage escorted by defendants ANTHONY STASSI, WILLIAM SORENSON, a/k/a Bubby, CARMINE CONSALVO and CHARLES ALAIMO.

11. In or about September, 1970, co-conspirator Michel Mastantuono and Andre Andreani removed approximately 40 kilograms of heroin from a Citroen automobile and delivered it to defendants WILLIAM SORENSON and ANTHONY STASSI in Westchester County, New York.

12. In or about June, 1971, in Montreal, Canada, co-conspirators Michel Mastantuono and others removed approximately 70 kilograms of heroin from a Fiat automobile and concealed it in a stationwagon.

13. In or about June, 1971, co-conspirator Jean Cardon drove a stationwagon to New York, New York.

14. In or about June, 1971, co-conspirator Michel Mastantuono drove a stationwagon to New Jersey and removed approximately 70 kilograms of heroin for delivery to defendants ANTHONY STASSI, WILLIAM SORENSON, a/k/a Bubby, CARMINE CONSALVO CHARLES ALAIMO and others.

(Title 21, Sections 173 and 174, United States Code; Title 21, Sections 812, 841, 846, United States Code.)
(Title 21, Section 963, United States Code.)

JN:ko

COUNT TWO

The Grand Jury further charges:

In or about September, 1970, in the Southern District of New York, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS, WILLIAM SORENSON, a/k/a Bubby, CARMINE CONSALVO and CHARLES ALAIMO, the defendants, unlawfully, wilfully, knowingly and fraudulently did import and bring into the United States contrary to law a narcotic drug, to wit, approximately 40 kilograms of heroin, in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and Dangerous Drugs finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code; Title 18, Section 2, United States Code.)

COUNT THREE

The Grand Jury further charges:

In or about September, 1970, in the Southern District of New York, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS, WILLIAM SORENSON, a/k/a Bubby, CARMINE CONSALVO and CHARLES ALAIMO, the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 40 kilograms of heroin, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Director of the Bureau of Narcotics and

JN:ao Dangerous Drugs Finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code; Title 18, Section 2, United States Code.)

COUNT FOUR

The Grand Jury further charges:

In or about June, 1971, in the Southern District of New York, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS, WILLIAM SORENSON, a/k/a Bubby, CARMINE CONSALVO and CHARLES ALAIMO, the defendants, unlawfully, knowingly and intentionally did import a Schedule I narcotic drug controlled substance, to wit, approximately 70 kilograms of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A)

COUNT FIVE

The Grand Jury further charges:

In or about June, 1971, in the Southern District of New York, JOSEPH STASSI, a/k/a Joe Rogers, ANTHONY STASSI, JEAN CLAUDE OTVOS, WILLIAM SORENSON, a/k/a Bubby, CARMINE CONSALVO and CHARLES ALAIMO, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 70 kilgrams of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A).

DISTRICT COURT ORDER DENYING MOTION FOR DISMISSAL OF INDICTMENT FOR LACK OF PROSECUTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

#42706

UNITED STATES OF AMERICA,

- against -

ANTHONY STASSI, et al.,

Defendants

MEMORANDUM AND ORDER

S 75 Cr. 502
S 75 Cr. 395
73 Cr. 405

FILED
JUL 1 9:22 AM '75
U.S. DISTRICT COURT
S.D. OF N.Y.

KNAPP, D.J.

The defendant Anthony Stassi seeks to dismiss all indictments against him primarily on the ground that his Fifth and Six Amendment rights to a speedy trial have been violated. The defendant's motions will be denied.

On April 30, 1973, the defendant Stassi was indicted for conspiring to violate the federal narcotics laws, and for committing one substantive narcotics offense. The conspiracy alleged was said to have existed from May 1, 1970 to October 15, 1970. The substantive count dealt with a heroin transaction in September, 1970. Stassi was the only named defendant in this indictment.

On April 17, 1975, a superseding indictment was filed,

75 Cr. 395.[1] In this accusation, Stassi is indicted, along with four others - including his brother Joseph - for conspiracy and for four substantive narcotics violations. The allegations in the second indictment expand greatly the scope of the charges contained in the first. The conspiracy charged in the superseding indictment is claimed to have existed from January 1, 1970 through December 30, 1972. The four substantive counts relate to the importation and distribution of heroin in September, 1970 and in June, 1971.

The motions now before the court all stem from the fact that the original indictment - the one filed in April, 1973 - was not made public until December, 1974. From the date of its filing, the government had repeatedly requested that the indictment remain sealed. The reason for such requests, according to the government, was to avoid jeopardizing a continuing investigation into the activities of defendant Stassi. Such applications were approved by various judges of this court from April 30, 1973 to December 20, 1974, a twenty-month period.

As is apparent from the face of both indictments, the charges contained therein were filed well within the applicable period of limitations.[2] The defendant nevertheless argues that the delay in indicting him after the commission of the last alleged illegal act in either of the two indictments violated his Fifth Amendment right to due process. He further claims that the sealing of the

1973 indictment violated his right to a speedy trial under the Sixth Amendment, and, in the alternative, that the sealing was improperly authorized. The defendant also seeks dismissal pursuant to Rule 4 of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases.

After careful consideration, we must reject all of the defendant's contentions.[3/] Trial in this case, which is estimated to last six weeks, will commence on October 6, 1975.

1. Pre-Indictment Delay

The 1973 indictment was filed on April 30 of that year, thirty months after the alleged conspiracy was supposedly terminated. The 1975 indictment was returned in April of this year, almost twenty-eight months after the expanded conspiracy there charged is alleged to have ended. Defendant maintains that both of these pre-indictment delays violate his right to due process of law as guaranteed by the Fifth Amendment and that the delays were calculated by the government to obtain a strategic advantage over him and to impair his ability to defend himself.

It is now well-established that the Sixth Amendment right to a speedy trial does not apply to "pre-accusation delays". United States v. Marion (1971) 404 U.S. 307. See, also, United States v. Mallah (2d Cir. 1974) 503 F.2d 971; United States v. Schwartz (2d Cir.

1972) 464 F.2d 499, cert. denied 409 U.S. 1009; United States v. Stein (2d Cir. 1972) 456 F.2d 844, cert. denied 408 U.S. 922; United States v. Iannelli (2d Cir. 1972) 461 F.2d 483, cert. denied 409 U.S. 980. In Marion, the Supreme Court indicated that the statute of limitations was the primary safeguard against the bringing of overly stale criminal charges (404 U.S. at 322). In this case, there can be no dispute that both of the indictments were brought well within the applicable period of limitations.[4/]

Although the Supreme Court has found that the Sixth Amendment is inapplicable to pre-indictment delay situations, the Court explicitly has left open the possibility that a demonstration of "actual prejudice" stemming from such a delay, could require a dismissal under the due process clause of the Fifth Amendment. United States v. Marion, supra, 404 U.S. at 324. Under this standard, the defendant has the burden of demonstrating at least that the delay caused substantial prejudice to the defendant's rights to a fair trial or that the delay was an intentional device to gain tactical advantage over the accused . 404 U.S. at 324, 325. It seems clear from the papers now before us that the defendant has failed at this time to either show the specific prejudice required or that the prosecution obtained an intentionally-planned tactical advantage.[5/]

First of all, there is nothing in the record which would suggest deliberate prosecutorial misconduct in failing promptly to

seek an indictment. Cf. United States v. Brown (2d Cir. 1975) _____ F.2d_____ (Feb. 20, 1975) slip op. 1847, 1851. An investigation of a major narcotics operation, as is here alleged, is a painstakingly slow and careful endeavor. Such an investigation often depends for its success on confidential information derived from participants in the conspiracy, who, for one reason or another, decide to cooperate with the government. This cooperation may not begin until after the conspiracy has terminated. Furthermore, it often happens that these participants may have limited knowledge of the full scope of the conspiracy or indeed of all the other members in the illegal undertaking. It may thus be necessary for the government to cultivate and rely on more than one source of information. As is evident from a comparison of the 1973 and 1975 indictments, the government - as late as 1973 - did not have detailed knowledge of the full breadth of the conspiracy which it subsequently alleged, a conspiracy which supposedly terminated in 1972. Under these circumstances, a thirty-month delay cannot be deemed by itself to be the result of deliberate prosecutorial misconduct.

Secondly, the defendant has failed to demonstrate "actual prejudice" which would impair his rights to a fair trial. The only prejudice claimed at this time is that the memories of many witnesses may have dimmed with the passing of time, that documents may have been lost and that crucial witnesses may have died. However, no

factual basis has been presented to substantiate such allegations. No witnesses have been named, nor have any documents been specified. In such circumstances, an allegation of prejudice is insufficient to warrant dismissal. See, United States v. Mallah, supra, 503 F.2d 971; United States v. Schwartz, supra, 464 F.2d 499; United States v. Iannelli, supra, 461 F.2d 483; United States v. Ferrara (2d Cir. 1972) 458 F.2d 868, cert. denied 408 U.S. 931; United States v. Briggs (2d Cir. 1972) 457 F.2d 908, cert. denied 409 U.S. 986.

II. Post-Indictment Delay

The defendant made his first request for a speedy trial on February 4, 1975, the date he was arraigned on the 1973 indictment. Shortly thereafter, a tentative trial date was set for May, 1975. When the government filed its superseding indictment in April, 1975, which not only added four new defendants, but also greatly expanded the scope of the charges, the court, over the defendant's objection, adjourned the trial date until October and denied the defendant's motion for severance.

The defendant claims that the twenty-one month delay between the filing of the 1973 indictment and his arraignment in February, 1975 violated his right to a speedy trial. In analyzing such a claim, we must apply the ad hoc balancing test enunciated in Barker v. Wingo (1972) 407 U.S. 514. Under this test, we must consider four factors: (1) the length of the delay; (2) the reason for the

delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant resulting from the delay. 407 U.S. at 530. See, also, United States v. Roberts (2d Cir. 1975) _____F.2d_____ (April 9, 1975) Slip Op. 2795.

Before assessing each of these factors individually, we deem it important to emphasize that the circumstances surrounding this litigation are unlike those in any other speedy trial case that has come to our attention. While technically Stassi was "an accused" as of April 30, 1973, there was no publication of this fact to the defendant or to the outside world prior to December 20, 1974, the date the indictment was ordered unsealed. Thus, several of the interests which the speedy trial rule is designed to protect - the prevention of oppressive pretrial incarceration, the minimization of anxiety and concern of the accused - are not relevant considerations. Furthermore, assuming trial does commence in October as planned, there can be little doubt that both the court and the government have moved expeditiously since the indictment was unsealed to bring this complicated, six-week-long narcotics conspiracy case to trial.[6/]

(1) Length of the Delay

As the Supreme Court noted in Barker, the length of the delay "is to some extent a triggering mechanism," since until there is some delay that is "presumptively prejudicial," there is no

necessity to consider the other three factors involved. 407 U.S. at 530. See, also, Wallace v. Kern (2d Cir. 1974) 499 F.2d 1345. In the instant case, the delay is approximately twenty-one months, a period of time we deem sufficient to warrant an inquiry into the remaining factors. See, U.S. v. Counts (2d Cir. 1973) 471 F.2d 422, cert. denied 411 U.S. 935; United States v. Infanti (2d Cir. 1973) 474 F.2d 522; United States v. Lasker (2d Cir. 1973) 481 F.2d 229, cert. denied 415 U.S. 975.

(2) Reason for delay

Closely related to the length of the delay is the reason the government assigns to justify the delay. In Barker, the Supreme Court indicated that courts should assign different weights to different reasons.

> "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." (footnote omitted) 407 U.S. at 531.

In the instant case, the government maintains that the indictment remained sealed in order to permit an ongoing investigation of the defendant, an inquiry, it feels, which would have been thwarted had the existence of the indictment been made public. While we believe

it may have been wiser for the government to have delayed seeking the 1973 indictment, there can be no question that the reason for the delay is a legitimate and appropriate one in terms of considerations of law enforcement. See United States v. Iannelli, supra, 461 F.2d 483; United States v. Briggs, supra, 457 F.2d 908.

In addition, the defendant has not presented any facts which support the claim that the delay was purposefully intended to take advantage of the defendant or to impair his ability to defend this action. In view of the much broader scope of the 1975 indictment, we do not feel, as defendant suggests, that the filing of this superseding accusation in April, 1975 was calculated to cause delay. The government, in fact, was prepared to proceed to trial on the superseding indictment in May, 1975. It was the court that decided that it was in the best interest of all the parties to delay trial until October. Given the desirability of conserving judicial resources through the use of a single trial, a severance, as defendant Stassi requested, was clearly inappropriate in this six week case.

(3) The Defendant's Assertion of the Right

This factor is not really relevant under the circumstances of this case. Since the indictment was sealed, the defendant could not assert his right during the period of the delay. At the time of his arraignment, the defendant did move for a speedy trial, and the court, as explained above, has tried to honor that request within the

exigencies of the court's calendar, the best interests of all the parties, and the interest of judicial economy.

(4) Prejudice to the Defendant

Finally, we come to the fourth factor - prejudice to the defendants. The Supreme Court in Barker indicated that prejudice should be evaluated in the light of the interests of defendants which the speedy trial right was designed to protect. There, the court identified three such interests (407 U.S. at 532):

> "(i) to prevent oppressive pretrial incarceration;
>
> (ii) to minimize anxiety and concern of the accused; and
>
> (iii) to limit the possibility that the defense will be impaired."

As noted above, the first two factors are not at all relevant to the delay between the date of the filing of the sealed indictment and the date the indictment was ordered unsealed. The defendant, furthermore, is currently out on bail, and if the case is tried in October as planned, will have been under a cloud of suspicion for only ten months, certainly as complicated conspiracy cases go, not an unreasonable, much the less unconstitutional, period of time.

As for the possibility that the defense may be impaired, this, as the Supreme Court noted in Barker, is "the most serious" of the three interests the Sixth Amendment was designed to protect since

"the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 U.S. at 532.

In the instant case, however, the only prejudice the defendant claims at this time is the dimming of memories, the loss of documents, and the death of witnesses. No specific factual support is given for these allegations. In the absence of such a specific showing, it is clear that these vague and conclusory statements of prejudice are insufficient to support a claim under the Six Amendment. See, Wallace v. Kern, supra, 499 F.2d 1345; United States v. Nazzaro (2d Cir. 1973) 472 F.2d 302, n. 3; United States v. Saglimbene (2d Cir. 1972) 471 F.2d 16, cert. denied 411 U.S. 966.

After weighing these four factors, it appears that the balance tips decidedly in favor of the government, and we must conclude that the defendant's Sixth Amendment right to a speedy trial has not be violated. We should note that the result would undoubtedly be the same if the length of the delay were computed from the filing of the sealed indictment to the scheduled date of trial in October, 1975, a period of thirty months, although the defendant has limited himself to the period between April, 1973 and the date of his arraignment in his moving papers. Absent a specific showing of prejudice, it is clear that such a delay - which is not without substantial justification - will be excused. See, Barker v. Wingo, supra, 407

U.S. 514; Wallace v. Kern, supra, 499 F.2d 1345; United States v. Lasker, supra, 481 F.2d 229; United States v. Infanti, supra, 474 F.2d 522; United States v. Fasanaro (2d Cir. 1973) 471 F.2d 717; United States v. Saglimbene, supra, 471 F.2d 16; United States v. Schwartz, supra, 464 F.2d 499.

III. The Sealed Indictment

The defendant also seeks dismissal of the 1973 indictment on the grounds (1) that the indictment was improperly sealed pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure; and (2) that the government violated Rule 4 of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases (hereafter referred to as "the Plan"). Both of these contentions must be rejected.

Taking the arguments in reverse order, the defendant contends that during the period between April 30, 1973 and December 20, 1974, the indictment was technically unsealed for a period totalling six and one-half months by virtue of the government's failure to file timely applications for the continued sealing of the indictment.

Rule 4 of the Plan[8/] requires the government to be ready for trial within six months of the date a formal indictment is brought. The Rule explicitly excludes sealed indictments from its ambit. The defendant contends that because the government did not seek timely applications for maintaining the indictment as sealed, the provisions

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of Rule 4 should apply. There is no dispute that the government announced its readiness for trial by May 19, 1975 - within six months of the formal unsealing of the indictment.

The defendant's arguments appear to be somewhat sophistic. First of all, we feel that Rule 4, by its own terms, does not apply to the facts at bar. Despite the defendant's contention that the indictment should be deemed unsealed for the six and one-half month period, the fact is that the indictment did remain sealed until December 20, 1974, except for the single limited instance on June 27, 1973 when Judge Wyatt of this court opened and resealed the indictment in order to issue a bench warrant. Secondly, even if Rule 4 was applicable, it seems clear that the government's failure to seek timely applications for continued sealing would be considered excusable neglect, especially in view of the fact that the defendant suffered no prejudice at all from any such negligence.

Defendant's other ground for dismissal concerns the propriety of the sealing of the indictment itself. Rule 6(e) of the Federal Rules of Criminal Procedure provides:

> "The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the Clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

Relying on United States v. Sherwood (D. Conn. 1964) 38 F.R.D. 14,

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the defendant argues that an indictment shall be kept secret for only one specific purpose, and no other - the taking of a defendant into custody. Since it is undisputed that the government sought the continued sealing of the indictment in order to avoid jeopardizing an ongoing investigation of the defendant, and in fact even knew the defendant's whereabouts during the period the indictment was sealed, the defendant maintains that the sealing was improper and the indictment should be dismissed. 9/

It should first be emphasized that the facts in United States v. Sherwood, supra, 38 F.R.D. 14, are totally distinguishable from the case at bar. In Sherwood, the court dismissed an indictment for lack of speedy prosecution which was filed and sealed shortly before the expiration of the applicable statute of limitations, but not unsealed until after the limitations period had expired. Under these circumstances, the court held that the sealing of an indictment "should extend not more than ninety (90) days from the return date." 38 F.R.D. at 20. The court specifically stated however, that where the unsealing of the indictment takes place before the running of the statute of limitations - as occurred in this action - the ninety day limitation "would not necessarily apply." 38 F.R.D. at 20.

Secondly, although it seems that a primary purpose for sealing an indictment is to secure the custody of a defendant, we are not prepared to hold that that is the only purpose for which the

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court's discretionary authority under Rule 6(e) can be exercised. In this regard it should be emphasized that the applications for sealing this indictment for the stated purpose of not jeopardizing a continuing narcotics investigation were all approved by federal judges in this district acting pursuant to Rule 6(e). Clearly, the reason given by the government is a legitimate law enforcement concern in deciding whether or not to make an indictment public. Although we feel twenty months is much too long a period for an indictment to remain sealed, we do not believe dismissal is warranted unless the defendant can demonstrate in some way that his Sixth Amendment right to a speedy trial has been abridged. In this case, the defendant has totally failed in this endeavor.

CONCLUSION

The defendant's motions to dismiss for violations of the Fifth Amendment, Sixth Amendment, Rule 6(e) of the Federal Rules of Criminal Procedure, and Rule 4 of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases are all denied. The trial in this case is scheduled to commence on October 6, 1975.

SO ORDERED.

Dated: New York, New York
June 20, 1975.

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

1/ That indictment has since been superseded by Indictment 75 Cr. 502, filed May 23, 1975. The new indictment is in all respects identical to 75 Cr. 395 except that two additional defendants are named.

2/

18 U.S.C. §3282 provides:

> "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

3/

Although we find no merit in any of the defendant's motions, we should observe that even if we were to dismiss the 1973 indictment, the government would still be able to prosecute the defendant on the expanded conspiracy charge contained in the 1975 indictment, as well as on its four substantive counts. Any claim that the defendant might have had with respect to double jeopardy now appears to be foreclosed by the Supreme Court's recent decisions in Serfass v. United States (1975) _____U.S._____, 43 U.S.L.W. 4315 (March 3, 1975).

4/

See 18 U.S.C. §3282, n.2, supra.

5/

It is unclear from Marion and unsettled in this Circuit, see United States v. Iannelli (2d Cir. 1972) 461 F.2d 483, 485 n.2, cert. denied 409 U.S. 980; United States v. Stein (2d Cir. 1972) 456 F.2d 844, 848, cert. denied 408 U.S. 922, whether both prejudice to the defendant and unfair advantage to the prosecution must be shown. In this case, however, the defendant has not shown either.

6/

It should be observed that had the 1973 indictment not been filed, and had the same exact charges then been brought inDecember, 1974 (which, ignoring all technicalities, is what in real terms occurred) the indictment still would have been filed within the applicable period of limitations. Furthermore, it seems apparent, see discussion, supra, partI, that under such circumstances any claim of

pre-indictment delay would be without merit.

7/ Because of prior commitments, as well as the Southern District's "crash program" on three-year old or older civil cases, October was the earliest date this six-week trial could be scheduled for.

8/ Rule 4 provides:

> "4. All Cases: Trial Readiness and Effect of Non-Compliance.
> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any cush motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government ha previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

9/ The defendant has moved for the disclosure of all electronic surveillance material in the possession of the government in which his conversations were overheard. The purpose was to prove that the government was aware of his whereabouts during the period the indictment was sealed and the bench warrant outstanding. The government has turned over to the court records of three conversations for in camera inspection. These records do demonstrate that the government was indeed aware of defendant Stassi's whereabouts during the period in question.

client, my client is alleged to have been in the Atlanta Penitentiary and involved in discussions with these individuals as well.

I think the evidentiary effect of Mr. Otvos's statement and testimony, were he to be called into court, would have a spill-over effect before a jury and would be beneficial to Mr. Sorenson.

Furthermore, the fact he is unavailable has made it impossible for me, as Mr. Sorenson's lawyer in these past sixteen days and whoever represented him up until the time that I was assigned -- Mr. Swinger -- to make whatever efforts might have been undertaken to speak with Mr. Otvos and to develop that possibility of exculpatory evidence, and that is Mr. Sorenson's reason for joining the motion, and I just wish to remind the Court at this point that a ruling is requested on his behalf as well.

THE COURT: I imagine Mr. Newman joins in that?

MR. NEWMAN: It is standard operating procedure for every defense counsel to join in every other defendant's motion, but in this case I don't see how I can get into it, in light of my request of indicating there are in effect separate conspiracies, which is the position I will be asserting throughout, so I do not join in this particular application.

THE COURT: I am inclined to deny the application,

but I make the following findings.

I find that the Parole Board in its total conduct was grossly negligent in ignoring the specific communication from the Department of Justice saying that this individual was likely to be indicted. However, I find that the negligence was certainly not -- I don't think the Parole Board thought of itself as protecting the interests of other defendants when they made this inquiry to the Department of Justice for information as to whether there were any organized crime involvements inthis potential parolee.

However, I will assume once negligence was established whoever is injured by it would be able to get the benefit of it.

The purpose, obviously, of making this inquiry to the Department of Justice was for the special interest of the Department of Justice in prosecuting the potential parolee, if they were going to do so. Why the supervisor did not act on the information he got we will never know, and the assumption that hethought there was anything he should do about it is wholly untenable.

However, I don't see that any negligence can be imputed either to the United States Attorney's office or to the agencies. In the first place, the United States Attorney's office was aware, I assume, of the general practice of the

Parole Board to make this kind of inquiry of the Department of Justice, and I don't see why they would have any reason to believe that the ordinary processes of the bureaucracy would follow and the man would not be paroled, and the U. S. Attorney's office was under no notice that anyone was contemplating paroling him.

That seems quite clear from all the memoranda that had been admitted.

Otvos himself apparently was surprised to learn that he was getting out earlier, so obviously he didn't tell the agents of this, and the agents' memoranda indicate that they were surprised also.

Be that as it may, I find no basis for imputing negligence to either the agents or the United States Attorney.

On the issue of the value of the testimony, I am not at all persuaded that the testimony would be of value to the defendant if this witness were here. It would probably be much more valuable if they could get it on deposition, because in those circumstances the defendant would be quite free to talk and it would be a very happy result from the defendant's point of view, I would think.

I cannot think of any other points that should be covered.

MR. GARLAND: It has been brought to my attention

(Recess.)

(In open court - jury present.)

THE COURT: Mr. Nesland.

MR. NESLAND: Now, as the Judge told you, prior to the time we even began summations this is what is called a rebuttal summation. I gave you at the outset approximately two and a half hours of what the Government contends the evidence showed in this case. I explained to you how the Government contended each of those pieces of evidence fit together, and I explained to you the theory under which the Government had presented this case.

Now, I can't go back into that and as you listened to defense counsel's summations, I had to expect of you and I'm sure you did consider as you listened to their arguments what my argument was in the initial summation. How I had explained this point, how I explained that point. I am limited now to respond to those arguments which are new.

The first argument that I want to respond to is the so-called fog, so-called gloss. You didn't hear that from Mr. Newman. You didn't hear that from Mr. Sorenson's lawyer, Mr. Naden. You only heard that from Mr. Garland and Mr. Kadish. I submit to you that they

were glossing it and that they were foggin when they said to you time and time again there is a frame. He's framing them, he is framing them. Perna is framing them, Verzino is framing them, Condello is framing them, Mastantuono is framing them. Everybody is framing them. Well, you think about it.

Who is in on that frame? Did they ever tell you who put that frame together? Who is in on it? Think about it. Who is in on it? There is no evidence, they couldn't prove, so they couldn't argue, obviously that these guys got together for a frame.

You know that Perna and Verzino told those stories independent of each other. You know that Condello told them independent of each other. You know that Mastantuono told them independent of the others. So there is no evidence that they schemed together. So, now what do they have to turn to? There is no scheme here. They weren't together framing them. So, now, it is the Government's suggestion. The Government suggested to these witnesses what they were to testify to. When Mastantuono identified every defendant in this -- when he identified Mr. Stassi, when he identified Mr. Sorenson, when he identified Mr. Alaimo, when he identified Albert Pierro, when he identified Carmine Consalvo, he had never

heard nor seen any other witness in this case. So what's the suggestion?

Photographs. He was shown photographs. And he picked out Tony Stassi, mistaken identification. He doesn't even know the other witnesses. He looks through hundreds of photographs and he picks out Tony Stassi. And if you look through Government's Exhibit S, the photographs in there, there are three of them of Anthony Stassi, three of them. Look at those photographs.

Who suggested to him to pick out Tony Stassi? Agent Bocchichio? Agent Bocchichio is in on the frame. Even though when he is first shown a group of photographs and he picks out Tony Stassi, Agent Bocchichio says no. Suggestion. Then he looks at that whole book again and he picks out Tony Stassi's photograph. You look at those photographs and you see if they don't look like Tony Stassi.

Then you have Condello. When he's arrested, he begins to cooperate. He tells the Government about Joe Stassi, about Tony Stassi, about Bubby Sorenson, Verzino and Perna were still in the street and he's telling the Government then about these events that were happening in Atlanta, Georga.

How Joe Stassi was in on it, how Tony Stassi

and Bubby Sorenson were on the outside dealing the drugs. Perna and Verzino are still on the street. So, what is Mr. Garland arguing to you, that Mr. Bradley said to him, we know you know about the Stassis. If you go through all of Condello's testimony, and if you go through all of Agent Bradley's testimony, there is not one answer, not one answer or one question that supports that there was ever a suggestion to Condello that we know you know about Joe Stassi.

Go through it, page by page by page. All the way through it. There is nothing there. Suggestion. And when Perna and Verzino began cooperating, there is no evidence there that they ever schemed to tell the same story about Joe Stassi and about Tony Stassi and about Bubby Sorenson and about Albert Pierro.

The same person Mastantuono talks about, Tony Stassi; the same person Mastantuono talks about, Bubby Sorenson; the same person Mastantuono talks about. So what do they argue there, because there is no way they can put them together, frame them together, Government's suggestion.

Do you understand what that means? That means that the Government had to suggest not only the names but every fact he testified about. About the meetings

in Atlanta, about Otvos, about the whole thing. They had to suggest all of that to them. That is not suggestion, ladies and gentlemen, that is subordination of perjury.

Who is doing it? Do you believe that? Did they ever tell you that Tony Bocchichio was suborning perjury or Mr. Sear and myself when we were questioning these people long ago and you heard them testify that hour after hour after hour we spent preparing them. Of course, they prepare their witnesses, we prepare ours. Were we suborning perjury, suggesting to them how to com in here and put the whole thing together?

That's what they are saying. Talk about gloss. Why don't they say it like it is? That's what they are saying. Zealous agents, zealous prosecutors, certain you are zealous when you enforce the law, but to suborn perjury, to bring these witnesses in here and to suggest to them time and again, no, you have got to say this, you have got to say that, you have got to have that meeting. Those witnesses were put on the stand and they testified to the events that they were telling the Government long ago when they had never talked to each other.

MR. NADEN: Objection. That's not in evidence. There is some evidence that some of those witnesses talked

ps25

to one another.

MR. NESLAND: That was after he told the Government about the events in this case.

THE COURT: Two of the witnesses were in with other lawyers in the case before then.

MR. NESLAND: That's when Perna and Verzino in 1973 were charged and they were in the State Courts together fighting their cases. I went through that on direct summation.

I will only remind you how implausible it is that they were scheming. If they were scheming and Perna broke out and Verzino began cooperating, you have Verzino's statement. Take tha. .n there and see if you believe that, the August, '7' statement. You take it in there and see if you believe it and Perna begins co-operating and he tells you the story that he told you from the witness stand. If they were scheming back in '73, as I told you in the beginning of the summation, they certainly missed the boat as far as getting the right people into the right frame. You know, they weren't scheming then.

MR. NADEN: I'm sorry to interrupt you again. I do not intend to interrupt Mr. Nesland again. 1974 is when they were in State Court.

ps26

THE COURT: You don't have to interrupt on something like that.

MR. NESLAND: So, we have these four witnesses there and Mr. Garland says to you, well, where is Suzie Verzino and where is Cuzzie Perna.

Now, if the Government if it really happened, why didn't they put Cuzzie Perna on there. Why didn't they put Suzie Verzino on there. Would that bolster their credibility one bit if their wives, if their wives came in and testified consistent with what they said? They have been seeing their wives throughout this whole time period. That's the evidence of scheming. That's the kind of evidence they wanted.

You see, they don't have that between Perna, Condello, Mastantuono and Verzino. But now you have it with respect to Cuzzie and Suzie, so we bring in Cuzzie and Suzie. They tell you you can't rely on these witnesses. They are bad people, they have committed lots and lots and lots of crimes. As I told you before do you think that bothered Joe Stassi, do you think that bothered Tony Stassi, do you think that bothered Bubby Sorenson, do you think that bothered Charles Alaimo?

MR. NEWMAN: Objection, your Honor. I ask for a withdrawal of the jury. He knows very well those

three witnesses had nothing to do with Alaimo. That was a very unfair comment from Mr. Nesland, but he knows better than that. I apologize for my shouting, your Honor.

THE COURT: You are correct.

MR. NESLAND: With respect to Mr. Alaimo, of course, it is only Mastantuono. But with respect to them --

THE COURT: Your motion is denied, Mr. Newman. Your observation is well taken.

MR. NESLAND: What they did, they relied upon them because they were what they are.

Now, they want you to say don't rely on those witnesses. Don't rely on those witnesses.

Why does defense counsel say that? Because they have got a deal. They got a gun at their heads. Is that gun pointed at their head, one that makes them lie or one that makes them tell the truth. The truth is the only way out for Mario Perna. The truth is the only way out for Anthony Verzino, and it is the easiest way out. If you tell the truth and the Government tells them, tell the truth, and they make deals conditioned on telling the truth, the easiest way out for them is to tell the truth. Not to manufacture a bunch of garbage. If they lied, if they deliberately lie and frame people,

the deals are off. But when they are sentenced and when they are sentenced, it won't be by the Government. It is going to be by the Court. The Court alone and the Court will be told what these witnesses have done. They know that. That's what their deals require that the Court be told all the crimes they have done. The Court be told everything about them.

(Continued on next page.)

T5 Mr. Garland read you Mr. Perna's testimony about the key and he read you Mr. Mastantuono's testimony about the key. Don't you think that will go before the judge who sentences Mario Perna? Don't you think the government will tell the court? Who brought it out? Who brought out through Mastantuono that he was in Bergen County and he saw Mario Perna making a key? Defense counsel? The government did.

If you recall, Mr. Garland was also telling you what he brought out on cross-examination and he read the testimony of Mastantuono. Well, what was brought out on direct examination? I asked Mastantuono that question. The government brought it out. Who brought out that these witnesses were criminals? Who brought out that these witnesses were liars, were perjurers? The government did. It brought it out on direct examination. Who brought out that Mastantuono had perjured himself before the grand jury? The government. And who told you, "I lied before the grand jury; I lied to the French; I lied to the government?" Mastantuono told you that. He admitted his grand jury testimony was false, where it was false, with respect to Astuto, the dead man. That is what he lied about. The dead man. Did the government find that out? Sure they did. But who told them? Mastantuono told them.

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Remember, back in November, 1974, he came to Agent Bocchichio and he said, "I lied about the Cardon station wagon; it went to Stassi, not to Astuto." That was about a year and a half after he testified in the grand jury that it went to Astuto. Did the government hide that? It brought it out through Mr. Mastantuono. And he told you why he lied. It was because of Danielle Ouimet. You heard her testimony, too. Throughout that whole period of time he was trying to keep her out.

Mr. Kadish asked why in the April grand jury would he lie? Danielle had confessed everything but that she knew it was heroin. Precisely. Precisely. At that time and up until this year she constantly said she didn't know it was heroin. So why did he lie? Because the Cardon car, as you know from Mastantuono's testimony and as you know from Ouimet's testimony, was the car that she helped load with heroin in Montreal. Danielle Ouimet admitted all her lies. Who brought that out? The government.

They claim that the government is guilty of subornation of perjury. What else would one say when all the evidence is in against you, as it is against Joseph Stassi and Anthony Stassi and Bubby Sorenson. You can't for the life of you show how those witnesses can tell the same story unless you say it is a frame.

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MR. GARLAND: Your Honor, Mr. Bradley said: "I first spoke to him regarding this matter during this period. I stated to him I knew he was familiar with Anthony Stassi and his narcotic dealings."

MR. NESLAND: The defendants have to say this, because it is either the truth or it is a frame. The problem they have is there is no way in this case to prove that these witnesses got together and framed them; so try the government; the government did it. Well, I submit to you that is ridiculous and it is obviously ridiculous.

Mr. Kadish talked about gloss. Well, let's talk about the gloss with respect to the delivery at the Mirabella house. He says Mastantuono testified it was a Saturday. Did he show you the records? The hotel records of the Abbey-Victoria? Did he go through Mastantuono's passport? If you recall, I showed you those records on the opening summation. Mastantuono came in to New York on September 27th, Sunday, and he testified and Ouimet testified. He testified that it was early the next morning or the morning thereafter, the 28th or the 29th that the car was delivered. That is a weekday, Monday or Tuesday, unless you reverse the calendar, unless we say he came in on a Sunday and the next day was Saturday, the calendar was reversed that year. Gloss? He wants you to try

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Mirabella; he wants you to try Autera, he wants you to try the agents, he wants you to try the prosecutor -- anybody but Tony Stassi, his client. All the evidence shows, ladies and gentlemen, Tony Stassi to be the outside man and the big man going to France, making the connections, making the arrangements, negotiating for the heroin to come into New York.

Badger Mr. Mirabella? You listened to me. Sure, I questioned him on those tolls, tolls that reflected calls to Carole Hoover, Stassi's girlfriend, tolls that reflected calls to Tony Stassi during a time period in which he says that he does not recall Sal Autera being there during that period. And then I pressed him. Of course I would press him.

"Do you recall when Sal Autera was there?

"Well, it was either May of '74 or May of '75."

But he came up one time, he said, during that time with his family. What did Sal Autera say? "I came up twice, Christmas of '74 and February of '75." Twice within the last nine months Mr. Autera and his family have visited from Florida Mr. Mirabella. Mr. Mirabella couldn't recall when, and he could only recall there was one visit. The point of that was not to badger him, but to show to you that within nine months he could not remember these visits.

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Do you really believe that he could recall five years ago that Sal Autera asked him on a weekday to borrow his garage? Mirabella was not home; his family was not home.

b2 The point is that you don't try Mirabella, you don't try Autera, you try Anthony Stassi, you try Joe Stassi, you have to find their guilt beyond a reasonable doubt. And they still haven't explained how all these witnesses can name Tony Stassi.

Let's talk about what Mr. Kadish says, that the government has not given you any evidence at all.None that Tony Stassi was ever in Europe. Do you recall we called an officer from the Passport agency and she testified that the Passport agency does not keep expired passports, they return them to the passport holder. So the government introduced into evidence Government's Exhibit 103. You don't have the passport; you have the passport application. And if you look at Government's Exhibit 103, the passport application of Tony Stassi, September, 1974, if you look, there is an area that you fill out, number of previous trips abroad within the last 12 months. It doesn't ask for the last four years. The last 12 months. 10 to 12 times. And you also have the countries intended to be visited: Europe. No evidence that Mr. Stassi has been abroad? The only evidence that exists.

Now we get the real fog, the real gloss, and that is the gloss about the glasses. Mr. Kadish read to you a number of reports that were put in of Mastantuono's debriefing. But he didn't go through these notes. These are the notes that Bocchichio made of his debriefing of Mastantuono back in July and August. And if you read these: "Bec and Mastantuono drove around the block a few times and parked in front of the red car. At this time he and Bec exited the vehicle and met a man in the street which Mastantuono has identified as one Andre Andreani. Bec introduced Mastantuono to Andreani who informed him that he was not ready yet and they went to a snack bar to have coffee. Andreani exited the snack bar, came back a short time later and informed them that they were ready to go. He and Bec went to the Citroen and Andreani went to his car. Andreani informed him that they were going to go around the block and when he came back they were to follow. At this time Mastantuono noticed Andreani meet another man who entered the red car with Andre Andreani. After they went around the block and passed them, Mastantuono pulled behind them and they started their journey."

No evidence at all? Mr. Mastantuono testified that Tony Stassi was in that red charger. It is right there. And if you look in the other statements, he says

Tony Stassi was in that red charger. Then after they left the diner, "They drove approximately one-quarter of a mile and went to a private house. They entered the driveway and drove to the back of the house where they entered the garage which was located directly under the house. In the garage they say a man who wore glasses."

Now the corrections, and you can read those. Bocchichio made those, spoke to them in French, 'Don't make any noise, there are people sleeping.' This person was the individual who had gotten into the car with Andre in New York."

There is the glasses and that is exactly what Mastantuono testified to, that he saw Stassi with glasses either in the garage or when they were carrying the suitcases out from the house. The same thing he said there.

Now, if you look through those statements, and you have to recall that Mastantuono was interviewed on a number of occasions about this event, if you look through this you will find that in some of these statements he put Mr. Stassi in the white Cadillac where you would expect him to be, with Mr. Sorenson. Is he lying about it? Or is he just trying to recall now and trying to recall last year and the year before and the year before what had happened two years even before that. There has been all

this association evidence. Nothing to it? Well, did he discuss with you Tony Stassi's telephone numbers? Three of them are in Anthony Verzino's book, seized from Verzino when he was arrested in 1974. Did he go through that with you? Did he go through Mr. Stassi's cards, the ones I went through with all the names and numbers? Did he go through that with you? And why would Bubby Sorenson's number appear under Bill and Bob? Nobody is glossing over the evidence, ladies and gentlemen. You just can't in two and a half hours or four hours or six hours or ten hours go through all the evidence in this case detail by detail. But I submit to you that the opening summation explained to you what happened in this case and why it happened and explains the facts to you as it came from the government's case.

You may recall that Mr. Newman in his summation made a dramatic point of the fact that when Mastantuono came back in November of 1974 he told Agent Bocchichio that Stassi was in the garage, but he didn't say anybody else was there. Now, that is why we have this statement which most of us have made to you that what counsel say is not evidence. What is evidence is what you heard from the witness stand and what you saw as exhibits. Because we are advocates. And if you read the testimony, Agent

Bocchichio's testimony on that point, you will find--and this is when Agent Bocchichio is testifying about Mastantuono telling him in November of 1974 that it was not Astuto, it was Stassi, Bocchichio on direct:

"Back in November when he told you about the house did he tell you anything else with respect to that delivery?

"A Yes, he told me that the delivery was not delivered to who he had originally told me he had delivered it to.

"Q Who had he originally told you?

"A He said it was the Astuto, Cirillo organization. I asked him who it was delivered to and he told me it was delivered to Mr. Stassi. He said it was delivered to Anthony Stassi and the same people he had delivered the first shipment to and he said that Pierro was in the house, the man in the tuxedo, he had seen him in the album."

So in November, '74, he was telling Agent Bocchichio the same people were at the New Jersey garage that he had delivered the Citroen to.

MR. NEWMAN: I respectfully suggest this is improper rebuttal, because it does not rebut what I said.

THE COURT: The jury will decide whether it rebuts it or not. I am not saying I am agreeing with what he says; I mean it is permissible argument.

MR. NESLAND: Now, Mr. Newman suggested to you

that the reason in February and March of this year the motive that Mastantuono had to identify Consalvo and Alaimo -- and, of course, his client is Mr. Alaimo -- the reason he had for doing that was to help him with parole, to get him an early parole. His parole date was October, 1975, and he had this burning desire to move it up. What did Mastantuono testify to? He was ready to do his time. What did Ouimet testify to? They asked her on cross-examination, "Did he ever talk to you about getting parole? Did he talk to you about getting out on early parole?" She testified he was always going to do his two-thirds. Then the judge told you that that is the time you do, two-thirds. So there is no evidence here he had any burning desire to get out four or five months earlier. But I suggest to you if the motive for putting those people in this was to get out, why didn't he do it back in June, July, August, 1974, back in 1973 when he was facing a lifetime in jail? Why? If he was just going to pick anybody out, why not pick them out when he was facing a lifetime sentence? He saw hundreds of photographs. If he was just interested in putting anybody in those cars and his motive for doing it was to make sure he got out, why didn't he do it when he was facing a lifetime sentence. But he didn't. He didn't because he never saw Mr. Alaimo's picture, he never saw Mr. Consalvo's

picture back then, he never saw Mr. Sorenson's picture back then; he didn't see them until February and March of 1975. That is why he identified them.

Mr. Naden asked you why did Detective Molfetta spend a great deal of time with Bubby Sorenson in 1974 and never identify the lighter? What had happened? By 1974 Condello had been arrested and cooperated; Perna was arrested; Verzino was arrested. Three of the people he had been working with were out of Atlanta, and two of them whom he had shown that lighter to had been arrested. Do you think he is going to keep that lighter that he got from the Frenchman? And Mr. Naden argued the government never proved that Sorenson went to France, that the government never proved he was meeting Frenchmen. That was not his role. That was Tony Stassi's role, to go to France. Mr. Sorenson's role was to pick up and deliver narcotics. But if you look at the 1973 Ovington Avenue tolls, and those are the only tolls from Ovington Avenue, you will notice that in August of 1973 there are two calls to France. And it is in September, if you recall, that Condello went over to Mr. Sorenson's apartment while he was hiding, and that was when Mr. Sorenson told Condello that "Tony Stassi is over in France working on another load and you can have a piece of it."

MR. NADEN: I am not sure that is in the evidence and I just want to have my objection noted.

THE COURT: The jury will remember.

MR. NESLAND: Mr. Kadish when he began his summation said to you, "God forbid that you should make a mistake and convict an innocent man." Of course, you should feel that way. But God forbid that you should acquit a guilty man. And in this case the government has proved by its evidence that Joseph Stassi is guilty, that Tony Stassi is guilty, that Bubby Sorenson is guilty, and that Mr. Alaimo is guilty, and it has proven that beyond a reasonable doubt. I ask you on behalf of the government to deliberate, to go through the evidence and see if you are not convinced beyond a reasonable doubt, beyond any doubt that these defendants are guilty and you should convict them. Thank you.

MR. NEWMAN: May we have a moment at the side bar with the stenographer, please, your Honor?

THE COURT: Ladies and gentlemen, it is now ten minutes of 5. I would assume that you probably would rather get to work than have a rest. We could charge the jury at this time and have you start your deliberations. I will excuse you for a few minutes.

(Jury excused.)

MR. NEWMAN: Your Honor, I would respectfully move--

I have not kept count -- but I would move again for a mistrial, and in deference to Mr. Nesland I won't ask for the withdrawal of a juror. It seems to upset him. I move for a mistrial on behalf of my client. Mr. Nesland at this late hour has injected into this case the credibility of the government behind witnesses and indicated a public need to obtain a conviction. I respectfully submit to your Honor that I used none of these phrases. He said, "God forbid you should acquit a guilty man." I don't have the case at my fingertips, but that has been condemned by the Court of Appeals in the Second Circuit. He further said,"See if you are not convinced beyond a reasonable doubt, beyond any doubt, that these defendants are guilty and you should convict them." I respectfully make this motion on behalf of Alaimo because I don't think anything I said could have triggered that.

THE COURT: Your motion is denied.

MR. NADEN: The defendant Sorenson joins in that motion. I also would like to add that in his remarks on rebuttal Mr. Nesland did put the credibility of the government behind these witnesses, saying that the deal for them was to tell the truth, as if it is the truth.

THE COURT: I will deal with that on my charge.

MR. GARLAND: May it please the Court, on behalf

of the defendant Joseph Stassi I move for a mistrial on the basis that the agreements entered into by the government with the witnesses Perna and Verzino are unconscionable to the extent that they put the government in the position of being part of the witness. They put them in the position of having the testimony delivered with the implied assertion that it is the government's opinion they are telling the truth or they would not put them on. It is done artfully. This prejudice comes home in light of the arguments, in light of the testimony.

THE COURT: You recollect that I charged the jury about the time that the agreement was read in evidence. I think the jury understands that that is not the case.

MR. KADISH: Your Honor, the jury needs to know we have not made any surrebuttal. I think they should be told we cannot make a surrebuttal. And I join in the mistrial motions.

United States of America

v.

Joseph Stassi, et al.

CHARGE OF THE COURT

(Knapp, J.)

(Jury in box.)

THE COURT: Ladies and gentlemen, before we get to the charge I have one bit of housekeeping. Some of defense counsel were concerned that you may think the reason they did not answer Mr. Nesland is that they had nothing to say. The reason they did not answer is they were not allowed to under the rules. The rules are that first Mr. Nesland speaks, then they speak, and then Mr. Nesland speaks and then I speak.

One other thing that Mr. Kadish asked me to call to your attention is the passport application, that on there there are the number of previous trips abroad within the last 12 months asked for, and that this says 11 to 12, and then there is a mark after that 11 to 12 which may or may not be a question mark. You will look at it if you wish to.

Let me now give you some preliminary logistics as to what is going to happen. In the first place, in a shorter case I try to deliver the charge more or less extemporaneously, because that is much easier for me and for you, rather than looking down at notes. But in a case

that has been going this length of time you get to be long winded if you do that. So I will follow my notes fairly carefully.

But that leads to another question: When one is following notes one tends to drop one's voice. And it is no secret that the acoustics in this room leave a lot to be desired. If anyone has at any time any trouble hearing me, please speak up and I will deem it a favor. If I drop my voice -- and this applies to defense counsel -- I would take it as a favor if anyone will call it to my attention, if you feel that you are not hearing or the jury is not hearing.

First I am going to charge you and then I am going to have a short recess while counsel for either side not in your presence can make suggestions, criticisms, requests for different instructions, in other words, point out wherein they think I have not told you the law as it should be told. The reason I say that to you, I just want you to be aware, because when I send you out at that point it is going to be the last time that I am going to say don't form or express an opinion, and even though it is the last time, it is still important. It is my purpose to give you the law correctly in the first place. But that may not be so. You have seen counsel on several occasions convince me I am wrong at one time or another, and it may well be that counsel for one

side or the other will call my attention to some significant thing that I either omitted or where I misspoke myself. So I am going to ask at that time for the last time you keep your minds open until I finally give you the law as I settle upon it to be.

Now, in this charge I am first going to refer briefly to the issues and then outline the general principles which the law has developed for guidance in dealing with these issues. Then I am going to discuss with you the specific crimes set forth in the indictment.

What, then, are the basic issues? As I indicated to you just before summations began, the first question you must decide: Was there a conspiracy hatched in the Atl[illegible] penitentiary by and among Mario Perna, Anthony Verzino, Jean Claude Otvos and Joseph Stassi -- or any two of them -- to import heroin from France for distribution in the United States?

Second: if so, did any one or all of the defendants on trial at any time become wilful and knowing participants in that conspiracy?

If you answer the first question in the negative, why that of course ends your deliberations, because under the theory upon which this case has been tried there will be nothing else for you to consider. However, if you answer

the first question in the affirmative beyond a reasonable doubt and give a similar answer to the second question as to one or more of the defendants, then certain other consequences will follow, which I will discuss with you later in this charge.

So much, for the time being, for the questions with which you are confronted. Let me turn to the general rules the law has developed for your guidance in dealing with those questions.

In the first place, as I have told you before, it is you who must weigh the facts. Nothing that I may say about the facts or that you may conceive that I think about them has any relevance whatever. It may surprise you to learn that I don't have to tell you that. Under the federal law I have the power, if I wish to exercise it, to tell you exactly what I think about the facts and what I think about the credibility of various witnesses, just so long as I make it clear to you that you are not bound by my views on such subjects. Why do I tell you that I have such power if I don't propose to exercise it? Simply for this reason:

I want you to thoroughly understand that it is my profound conviction that the jury system only works if, indeed, the jury totally disregards anything that they may think the judge feels about the facts. So I just want you

to realize I am not telling you this to take care of some formality I have to meet; I am telling you this because it is my profound conviction that, unless you follow this particular instruction, justice may not be done in this case.

As finders of the fact you will, of course, be judges of the credibility of the witnesses. There is no mystery about how you judge the credibility of witnesses. Every day in your life you have occasion to judge the credibility of people with whom you come in contact, members of your family, your friends, business associates, competitors--everybody who speaks to you wants you to believe what he or she says, and in the course of your daily existence you develop certain criteria or antenna by which you judge the weight you will put on what people are saying to you.

b2 The theory of the jury system is that it is better to have the judgment of 12 persons than of one person. After all, if any one person has to make a decision as to the credibility of these witnesses, he or she would only have one set of criteria, one set of life experiences, his or hers, to go by. The jury, on the other hand, has 12 such sets, and the law says -- and I agree with it -- that a sounder result is reached if the 12 of you pool your common experiences in making your decisions.

Of course, that only works if you do what the law contemplates, namely, discuss the matter with each other with an open mind so that each of you can get the benefit of the experience and judgment of the others.

Incidental to your function in this regard is the rule that your recollection of the facts controls. What I may remember or what counsel may remember is wholly immaterial. It is your recollection that controls, and if you have any question about anything that seems important to you, you can have the stenographer read back pertinent parts of the testimony. Even then if you disagree with what the stenographer reads back, your recollection controls. We are all fallible, and you are fallible too, but the law places the responsibility on you.

If your recollection is different from what the stenographer has done and if after giving due weight to the stenographer's expertise you still conclude that your differing recollection is correct, you have just got to assume that the stenographer made a mistake. As I say, we are all fallible, but the law places the responsibility on you and you must make the decision.

Now, the law does have certain guidelines. One is that you are entitled to take into account the interest any witness may have in the outcome of this action.

To start off, a defendant, obviously, has an interest. He wants an acquittal. That is his interest. The defendants, on the other hand, claim that various of the government witnesses, including government agents, had motives to falsify -- to some of which claims I will refer later -- and that you should regard them as interested witnesses.

The point is that it is for you to say whether and to what extent any witness has an interest in the outcome of the case, and, if so, whether and to what extent such interest has influenced his or her testimony before you. Obviously, you just don't reject a witness out of hand because he or she may have an interest, but you consider the extent of such interest and decide what effect, if any, it had on the testimony.

Isn't that what you do in everyday life? Most people who talk to you have an interest in having you believe what they say. Otherwise, by and large, they wouldn't bother to say it. In everyday life you take their interest into account in evaluating what they tell you, and that is precisely what you do in the jury room.

With respect to the witnesses Perna, Condello, Verzino, Mastantuono and Ouimet, there is a related consideration that comes into play. According to their own testimony, these witnesses are -- or in the case of Condello maybe --

guilty of the very crimes charged against these defendants. The law calls any such person an accomplice. An accomplice is a man or woman that could be convicted of the very crime that is on trial.

The law says that you are entitled to act on the testimony of such a person, but that you must subject it to special scrutiny. That is plain common sense. Obviously, any person subject to prosecution for crimes may either have, or think he has, an interest in ingratiating himself with the government by testifying on the government's behalf. Obviously, it is more comfortable to be on the witness stand than in the defendant's box. Therefore, the law says -- and it is plain common sense -- that you should take those factors into account in weighing the testimony of such a witness.

However, the law also says if after having taken those factors into account you come to the conclusion that the witness has given truthful testimony, i.e., factually accurate testimony, you may act upon it exactly as you would upon that of any other witness.

Now, that is the general rule about accomplice testimony. But as the question of the veracity of these accomplice witnesses is so vital, I will go into the matter in more detail. I am going to discuss the question with

respect to the witness Perna, not because I think he is more or less important than any other witness -- that is a judgment entirely within your province -- but because his testimony came first in time and because the principles stated as to him can be applied, to the extent you find proper, to any of the other accomplice witnesses. Now, what are some of the considerations relevant to your evaluation of Perna's testimony?

First, as he readily admits, his life has been of crime;

Second, he has lied on various occasions and on, at least, one occasion committed perjury by executing a false affidavit;

Third, his sole reason for deciding to cooperate and become a government witness was the hope that he could thus avoid almost certain incarceration for the rest of his life, and that he could save his wife from a similar fate;

Fourth, although the government neither could nor would promise him that this hope would be fulfilled, he insisted that the government put in writing his promise to advise the judge before whom he is to be sentenced -- Judge Irving Ben Cooper of this court -- of any cooperation that he might render, and to give similar information to the Board of Parole.

Those are some of the considerations you must obviously ponder in considering Perna's testimony. But let me emphasize that they are only relevant to the question of whether his testimony is factual and accurate. If you should conclude that his testimony was factual and accurate, it would be your duty to act upon it. It would, indeed, be a violation of your oath of office if you decline to act on testimony which you find to be factual and accurate simply because you disapprove of its source. What I am getting at is that it is no concern of yours or mine whether the government should or should not have made these arrangements with Perna. That may well suggest a problem for Judge Cooper when he comes to impose sentence. Our only concern here is whether Perna's testimony was factual and accurate insofar as it is material to the issues which you are to decide.

But let me come back for a moment to the written contract between Perna and the government. That contract, you will recall, provides in effect that all bets are off if, in the government's opinion, Perna varies from the absolute truth in any of his testimony. Now you have heard a lot about that phase of the contract. Its only importance here is what you think Perna understood as the meaning of "truth" in that context. Did he, as the defendants suggest,

understand "truth" to be a code word or whatever the government might want to hear? Or did he, as the government urges, accept the word at its face value? As to that, let me emphasize that it is wholly unimportant what the government meant by that provision in the contract. Nobody here is challenging Mr. Nesland's good faith. The important question, and the only relevant question is, what do you find that Mr. Perna understood by it? Do you find that he in his own heart believed that Mr. Nesland wanted only the truth? Or was it his conception that Mr. Nesland would declare the contract forfeit if Perna fails to come up with convincing testimony, regardless of its accuracy.

As I have indicated, these general principles, with wide variations as to detail, apply to all the accomplice witnesses. You have heard the arguments on both sides, and it is not my purpose to repeat them.

With respect to these witnesses, indeed, with any others, it is your responsibility to consider any hopes they may harbor in their breast or any pressure they may feel to be under in determining to what extent, if any, such hopes or pressures may have affected their testimony. However, once you have decided, if you ever do decide, that any or all the testimony of any witness, either for the prosecution or the defense, is factually accurate, you may, and, indeed,

you must, act on such factually accurate testimony.

There is another rule of general application, which is that if you find that any witness who has testified before you has deliberately lied on a material matter, that is, a matter important to this case, you may, if you wish, reject and disregard everything that particular witness has said. But you are not required to do so. You may reject that part of his or her testimony that you find to be untruthful and accept and act upon such part as you find truthful. Now, again, that is just common sense. In your ordinary experiences some people may have told you a lie and you say to yourself, 'I am never going to believe anything he or she may ever say again. Life is too short to be bothered by trying to sort out truth from falsehood as far as this particular person is concerned." On the other hand, you may, after some person has told you even some outrageous lie, consider the motives which caused the person to lie and conclude that in the future you will believe him or her if you find such motives not to exist. Like everything else, you act in the same common sense way you would in your daily lives. Remember, this rule only applies to testimony that is wilfully false; it has no application to mistakes. And that, again, is common sense.

Now, when several witnesses were on the stand,

one party or the other called his or her attention to prior statements made by the witness which either were or were claimed to be inconsistent with something the witness had said on the stand. Now, such prior statements fall into two categories: those made not under oath, such as statements claimed to have been made to various government agents, for example; and then those statements made under oath, such as made before a grand jury, for example, those made by the witness Mastantuono before the grand jury and in the letters rogatory.

The rule with respect to the first category, those not under oath, is that such prior statements have no value of their own as evidence. They may not be used to establish any fact not otherwise proved. Their only proper function is to permit you to evaluate the sworn testimony of the witness as given before you. To the extent that you find such statements helpful for that purpose you should consider them. Otherwise, ignore them.

With respect to the second category, those under oath, the rule is otherwise. Prior statements under oath, a prior statement made by a witness after taking an oath, may in your discretion be used as affirmative evidence of facts contained therein. Of course, you don't have to use them for that purpose and you should not do so, unless

satisfied that they, in fact, represent the truth.

In this connection you will recollect that Mastantuono gave testimony before two grand juries and in the letters rogatory which tended to exonerate these three defendants in the station wagon transaction. Should you find this grand jury testimony and rogatory testimony to be truthful, you may use it as affirmative evidence to support the defense. If, of course, you find it not to be truthful, you should ignore it.

Perhaps this is a good time to bring up the question of association testimony, about which you have heard a great deal. Where a person is charged with conspiracy, the law allows evidence of association, even wholly innocent association, with his alleged co-conspirators, both indicted and unindicted. The theory is that people engaged in a joint enterprise may be more likely to be found together than those not so engaged. But it must be obvious to you that association in and of itself proves nothing. There could be any number of reasons why the defendants socialized with each other. For example, as I indicated, when you were being chosen, nothing could be more natural than two brothers associating with each other. Similarly, you might well consider it natural that persons thrown together in jail would continue to associate with each other after their

release.

The point that after giving it the cautious treatment I have indicated, you may use evidence of association, along with all the other evidence in the case, in determining whether or not guilt has been established beyond a reasonble doubt. I suppose, in the final analysis, it would be your views as to the nature of the association testimony that will control, what importance, if any, you attach to it.

At this point I might interject a thought, obviously the fact that these defendants are now associating with each other during the trial is of no consequence whatever. That association is wholly involuntary. Assuming they had never seen each other in their respective lives before, they would have a government-induced joint interest now in acquittal, and, obviously, that government-induced joint interest is going to cause their lawyers to associate with each other and may well cause them to associate with each other during the course of this trial. No inference of any sort can be drawn from that. It sounds obvious when you say it, but if you don't say it, someone might not think of it.

Now, changing the subject a bit, there is one peculiarity in this case with respect to the lawsuit against

the defendant Alaimo. You will recall that Mr. Nesland told you that the only direct evidence against him constituted his participation in the Citroen and station wagon delivery. The witness Mastantuono was the only one giving that evidence. Therefore, you may not convict the defendant Alaimo unless satisfied beyond a reasonable doubt that Mastantuono correctly identified him as participating in those two deliveries.

This brings me to the question of reasonable doubt. Let me define that term for you. The words really define themselves. When you analyze it, it is common sense.

In a civil case all that a plaintiff has to do is establish his case by what is called a preponderance of the evidence, which boils down to mean that it is more likely than not that what the plaintiff has asserted is true and the jury is entitled to give him his verdict. Now, that may be fine, and, indeed, is fine when all that is involved is whether A should pay B some money. But the purpose of the government in bringing a criminal case is to authorize the court to commit the defendants to jail. And our liberties wouldn't be worth much if it were possible to put a man in jail simply because his guilt seemed more probable than his innocence. Therefore, the law says guilt must be established beyond a reasonable doubt.

There are two words in that definition: "reasonable"

and "doubt." The meaning of doubt is self-apparent. The word "reasonble" is, in the last analysis, equally self-defining. It means a doubt for which you can give a reason. It is not just a fanciful doubt or an excuse for ducking a disagreeable duty. Nobody likes to be in the position of convicting a fellow human being. But the law would also be in a sorry state if jurors wouldn't take the responsibility for finding guilt where it is established beyond a reasonable doubt.

Also, the "reasonable" part of the term goes to the essence of jury deliberation. If one of you has a doubt and expresses a reason for it, and another juror has no doubt, the expression of your reason for your doubt will probably do one of two things: it will either enable your fellow jurors to demonstrate that your doubt is unreasonable, or it will enable you to demonstrate to him or her that he or she should have a doubt.

If you express your doubts or lack of them to each other, you should be able to resolve them one way or the other. Of course, a doubt, like everything else in this case, a reasonable doubt, must be based on the evidence or the lack of evidence, not on something you may have heard on the outside or some impression or opinion you may have derived from the outside. It has to be based on the evidence

or lack of evidence. Otherwise, how could you discuss it with your fellow jurors? All that you have in common with each other is what you have heard in this courtroom, and it is that common basis upon which you must base your deliberations.

In this connection, I may point out that while it is your duty to discuss your doubts or lack of them with each other and listen to each other's views, you should adhere to any conscientious opinion which you might hold, and not give it up merely for the sake of unanimity. I don't think there is anything I can add to that. The law simply requires you to do your best to convince your fellow jurors of the correctness of your view and at the same time to listen with an open mind to theirs and to make a conscientious effort to reach a result which conforms to the conscientious belief that each of you holds.

I assume you are not going to start unanimous. Unanimity comes from discussion among you, an exploration of your doubts or lack of them, and a discussion of the evidence or lack of evidence on which there is doubt or lack of it. That is how unanimity is achieved.

b5 Before I leave the question of reasonable doubt, it being so important, let me read another definition that was given by a judge for whom I have great respect:

"It is a doubt based on reason which arises from the evidence or lack of evidence in the case. It is a doubt that appeals to your reason, to your judgment, to your common understanding and your common sense. It is a doubt such as would cause you to hesitate to act in matters of importance in your daily lives. But it is not caprice, whim nor speculation. It is not a doubt that a juror may conjure up to avoid the performance of an unpleasant duty. It is not sympathy for a defendant. Let me repeat: it is a reasonable doubt."

That ends the quotation. That, you can see, does not differ from what I said, but I just thought he said it rather well.

Closely related to this doctrine of reasonable doubt is the concept of the presumption of innocence. That means that the government has the burden in this case and that such burden never shifts. I have told you that the defendant does not have to prove anything. The point is that the presumption of innocence continues in his favor throughout the entire trial and remains there in the jury room until you have finally resolved it, if you ever do, by a verdict of guilty. It means this: right up to the last minute your discussion should include the proposition that the government has the burden, and if the government

has not sustained that burden, that that in itself can be the basis of a reasonable doubt.

In connection with the presumption of innocence, let me remind you of what I told you when you were being selected and what I again emphasized right after three of the defendants had announced that they rest their cases. It would apply to the three. These three defendants in deciding to rest their cases without themselves taking the witness stand were exercising a right given them by the Constitution of the United States. For reasons I have explained to you, unless you respect that right and refrain from speculating as to why they exercise it, or what they may have said had they otherwise decided, those three defendants will not have had a fair trial. I think I need say no more.

I have several times mentioned to you the division of responsibility between me and you.One result of that division is that you should have no concern with what punishment might be imposed upon any of the defendants should your verdict as to any or all of them be guilty. That is my responsibility. I trust you to deal with the facts.

You must trust me to deal with any responsibility your verdict may impose upon me.

I have mentioned to you that the indictment in and of itself is no proof of anything. I have told you that

it is no concern of yours, nor at this moment of mine, why those named in the indictment, other than these four defendants, are not on trial before you. The same goes for any other alleged co-conspirators whose names you may have heard. Your and my present concern, each keeping within our own responsibility, is to determine whether these defendants, or any of them, are guilty beyond a reasonable doubt of the charges set forth in the indictment. We are not concerned with anybody else.

It has been called to your attention that various witnesses, both for the prosecution and the defense, have been convicted of a wide variety of crimes. The law on that subject is that you may, if you deem it proper, conclude that a person who has been convicted of a serious crime is less likely to tell the truth than one who has not been so convicted. You may, therefore if you think it proper, either reject or give less weight to the testimony of such a person. However, you may not, as a general rule, use the fact of a conviction for any other purpose whatever.

For example, in the case of the defendants Joseph Stassi and Sorenson, the very circumstancs of this case brought to your attention that each of them was in Atlanta pursuant to a conviction. I charge you that you may not use that fact as any indication that either of them is likely

to commit any other crime, much less the one on trial. Nor with respect to Sorenson can you use the fact of a conviction for any purpose whatever.

There is, however, a peculiar twist into the situation with respect to the defendant Joseph Stassi. Both sides contend that the circumstances of that conviction are relevant to the problem of his guilt or innocence in the present case. You will recollect that you first heard about the details of his conviction during Mr. Garland's cross-examination of the witness Verzino. Mr. Garland then brought out that Verzino was familiar with the trial record leading to the defendant Stassi's conviction based on the fact, Mr. Garland suggested in his cross-examination, and again in summation, that it was from such trial record that Verzino had learned the names of the persons Mr. Stassi had been charged with conspiring with, including one, Montelione, and thus was able to come up with appropriate testimony to frame Mr. Stassi in the case at bar.

The government, on the other hand, urges that the defendant Joseph Stassi's conviction for importing heroin, which conviction was known to Verzino, is an explanation of why Verzino turned to him to assist in the Otvos project, and that that such conviction suggests a certain amount of expertise in the business of heroin import, i.e., that he

had the ability to do what he has been charged with doing. It is for you to say which, if either, of these arguments has validity. But you may not use the fact of the conviction as any indication whatever that Mr. Stassi had a predisposition to commit this kind of crime.

Of course, the mere fact that Mr. Stassi is presently serving his sentence is of no consequence whatever. In this connection, although it is immaterial, let me make clear that no other defendant is under sentence at this time. The fact that Mr. Stassi is presently serving a sentence does not take one whit away from his rights in this courtroom.

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While talking about convictions, let me make one observation that may be self-evident, but, then, again, may not be. The mere fact that government agents have a person's picture in their files is no indication that he or she has ever been convicted or been guilty of any wrongdoing whatever. There are any number of wholly innocent reasons why a picture might be in an agent's files.

Let us now turn to the specific charges set forth in the indictment. As I indicated before summations began, the first and primary charge is that of conspiracy.

The conspiracy with which we are concerned is claimed to have been hatched in the Atlanta penitentiary

in the spring of 1970, while Perna, Verzino, Otvos and the defendant Joseph Stassi are claimed to have conceived the plan of exploiting a certain contact in France, namely, one Jean Guidcelli, or the "Uncle," with whom Otvos is claimed to have done business. This conspiracy, as I say, is claimed to have been hatched inside the prison. It is further claimed that Joseph Stassi recruited his brother Anthony to go to France to make necessary arrangements with the "Uncle." It is also claimed that the defendant Sorenson when he got out of jail, and the defendants Anthony Stassi and Charles Alaimo, among other people, were concerned with receiving and distributing the heroin. In brief, the accusation with which we are dealing concerns only heroin which may have been imported into the United States as a result of the plan claimed to have been hatched in the Atlanta penitentiary to exploit Otvos' connection with the Frenchman known as the "Uncle." Now, that is the conspiracy and the only conspiracy with which these defendants are charged.

I emphasize the word "only" because you have heard a great deal of testimony about their illegal acts in which one or more of the government's witnesses were concededly engaged and in which one or the other of the defendants, except Alaimo, might possibly have been involved. However, the defendants are charged only with the particular conspiracy

I have outlined, and it is only that of which any of them can be convicted. So if it should be your frame of mind as to any defendant that you have a reasonable doubt as to his guilt of the conspiracy I have outlined, but you are dead certain that he had committed some other crime, it would be your absolute duty to acquit such defendant. The reason for that is obvious. This conspiracy is all any defendant has been charged with. There is no way we can tell what defenses might have been interposed had some other illegal conduct been charged in the indictment. Defense counsel in this case were responsible only for meeting the charge in the indictment. If as to any defendant or defendants you have a reasonable doubt on that charge, such defendant or defendants is or are entitled to your verdict of acquittal.

How then does the law define a crime of conspiracy? The crime of conspiracy is defined in the statutes of the United States substantially as follows: If two or more persons conspire to commit any offense against the United States and one or more of such persons does an act to effect the object of the conspiracy, he shall be guilty of the crime of conspiracy. It is very simple. Let me repeat it: If two or more persons, any two, conspire to commit an offense against the United States, and one or more of

such persons does an act to further the object of the conspiracy, he shall be guilty of the crime of conspiracy.

You can readily see that there are three elements of the crime, each of which must be established to your satisfaction beyond a reasonable doubt:

First, there has to be a conspiracy;

Second, the object of the conspiracy has to be to commit an offense against the United States, that means to say, to violate a statute of the United States;

Thirdly, one or more of the conspirators has to do something to effect such unlawful objective.

What, then, is a conspiracy? A conspiracy in ordinary layman's language is no more or less than a common undertaking entered into between two or more persons to achieve some unlawful objective.

We are always in our daily lives watching people engage in common undertakings. If three of you should agree to have lunch together and send one of you ahead to the restaurant to reserve a table and put in the orders, the three of you would be engaged in a common undertaking. A common undertaking only becomes a conspiracy, however, if the objective is unlawful.

The first task then is to determine whether Perna, Verzino, Otvos and the defendant Joseph Stassi, or any two

of them, were engaged in a common undertaking to violate the narcotic laws of the United States.

A conspiracy, obviously, does not have to be in writing and does not have to have any particular formality attached to it. It is, as I have said, simply a common undertaking. Indeed, all conspirators don't necessarily have to know what the others are doing or have done. What is necessary, however, is that each conspirator knows the existence of the common undertaking, is aware of its unlawful purpose, and intends to further that particular unlawful purpose.

If you become satisfied beyond a reasonable doubt that such a conspiracy did, indeed, exist, then you should consider whether the government established, again beyond a reasonable doubt, that any or all of these four defendants at some point became knowing and wilful participants in such a conspiracy. One cannot stumble into a conspiracy by mistake. A person cannot be guilty of conspiracy merely because he associates with others who happen to be so guilty.

A person can be guilty of conspiracy only if he knows the common undertaking is underfoot, if he knows that such common undertaking has a particular unlawful purpose, and if he wilfully and intentionally decides to join in the common undertaking for the purpose of furthering that particular unlawful purpose.

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Let me illustrate that proposition by an example you will readily recognize. You will remember Danielle Ouimet. If all she had done was take two trips to New York for the sole purpose of being with her fiancee, she would have been guilty of no crime whatever, even assuming that she knew he was transporting heroin, and even assuming that she knew that he was financing his and her trip by his ill-gotten gains. She would have known of Michel Mastantuono's illegal conduct, and so knowing she would have associated herself with him and would even have received incidental benefits from his crime.

The essential element that would have been lacking, however, would have been any intent on her part actively to further illegal enterprise in which he was engaged, and any acts designed to implement that essential intent. What, in actual fact, made Danielle guilty of the crimes in which Michel was involved was her decision actively to assist him and her conduct in implementation of that decision, such as, for example, sewing in the heroin and making that trip to Florida.

Now, let us apply this document to the Government's lawsuit against Charles Alaimo, the one in which, as Mr. Nesland has told you, the Government seeks to establish guilt of conspiracy solely on the basis of the

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nature of Alaimo's participation in the Citroen and station wagon deliveries. Of course, as I have told you, if you are not satisfied beyond a reasonable doubt that he did so participate you need not concern yourself with what I am about to say. However, if you are satisfied as to that, you will next ask yourselves whether the nature of that participation was such as to satisfy you, again beyond a reasonable doubt, that he was aware of an existing conspiracy to import and distribute heroin and that he intended to further the objectives of such conspiracy.

Of course, Alaimo would not have to have known the identity of the members of the conspiracy, any more than the other conspirators necessarily would know his name or identity. What is necessary, however, is that he have been aware that a conspiracy to import and distribute heroin was underfoot and that he wilfully and knowingly determined to assist that criminal enterprise in attaining its ultimate unlawful purpose, i.e., the distribution of heroin.

In determining whether you can come to such a conclusion beyond a reasonable doubt, you will take into account everything you know about the man, the manner in which you find him to have acted on the occasions in question, and everything else you know about him.

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To summarize, then, before you can find that any of these defendants participated in a conspiracy, you must find as to the particular defendant whose case you are considering, first, that he knew an unlawful conspiracy to be afoot; second, that he knew the objective of the conspiracy to be the unlawful importation and distribution of heroin; and, finally, that he knowingly and wilfully participated in the conspiracy for the purpose of advancing such unlawful purpose.

In this connection, let me give you the legal definition of the words "knowingly" and "wilfully".

An act is done knowingly if it is done voluntarily and purposefully, not because of mistake, accident or mere negligence, or any other innocent reason. An act is done wilfully if it is done knowingly, deliberately, and with an evil motive or purpose.

Now, of course, evil motive or purpose is something that you don't see on a tape. A man doesn't go around and put a sign on, "Now I have an evil motive or purpose." There is no way known to find out what is inside a man's mind.

You decide whether or not he had an evil motive or purpose by looking at everything that you believe that has been said about his activities and decide whether all

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those activities, all the evidence that you believe about his activity, satisfies you beyond a reasonable doubt that his motive or purpose in acting as he did was evil within the terms as I have defined them. Evil in this context means an intentional violation of the narcotic laws of the United States. It does not mean conduct of which you don't approve.

If you do find such knowing and deliberate participation to exist, its extent is immaterial. It does not make any difference whether one is a main conspirator or a less important one. If one only participated in the conspiracy, his guilt is equal, and that is all there is to it.

Nor does it make any difference as far as one's guilt of the crime of conspiracy is concerned whether one was a member on the day that the conspiracy was hatched, or whether he joined it in the last day before its dissolution. Knowing participation at some point is all that counts.

If then you should find beyond a reasonable doubt that the criminal conspiracy I have described came into being and that any or all of these defendants wilfully and knowingly participated in such conspiracy, it next becomes necessary to determine whether any conspirator

committed an act, what is called an overt act, in furtherance of the conspiracy. You will recollect that I told you when I read the statutory definition, somebody has to do something in furtherance of the conspiracy. It is a peculiarity of the law of conspiracy that mere talk and agreement is no crime; someone has to do someth ing, take some step, to accomplish or further the unlawful obj ect. Such a step is called an overt act.

The indictment charges that several such overt acts were committed in furtherance of the conspiracy, and you must find beyond a reasonable doubt that at least one such overt act, one of the ones charged in the indictment, in fact, occurred. I will call your attention to six such overt acts:

"7. In or about September, 1970, co-conspirator Michel Mastantuono drove a Citroen automobile from Montreal, Canada, to New York, New York.

"8. In or about September 1970, co-conspirators Michel Mastantuono and Jacques Bec drove a Citroen automobile to Fifth Avenue, New York, New York, to meet co-conspirator Andre Andreani.

"9. In or about September, 1970, co-

conspirator Andre Andreani met defendant Anthony Stassi in New York, New York.

"10. In or about September, 1970, co-conspirator Michel Mastantuono drove a Citroen automobile to a garage escorted by defendants Anthony Stassi, William Sorenson, a/k/a Bubby, Carmine Consalvo and Charles Alaimo.

"11. In or about September, 1970. co-conspirator Michel Mastantuono and Andre Andreani removed approximately 40 kilograms of heroin from a Citroen automobile and delivered it to defendants William Sorenson and Anthony Stassi in Westchester, New York.

"13. In or about June, 1971, co-conspirator Jean Cardon drove a station wagon to New York, New York."

I charge you as a matter of law that before you may convict any defendant of anything you must find beyond a reasonable doubt that at least one such overt act occurred substantially in the manner charged and that its occurrence was in furtherance of the conspiracy.

Turning to the other crimes alleged in the indictment, which, as I have said, you may only con sider as to any defendant whom you may have found guilty of

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conspiracy, the law is quite simple. The law provides that when an unlawful act is done in furtherance of a conspiracy by one of several co-conspirators and such unlawful act was in the reasonable contemplation of the other conspirators, each conspirator is as guilty of performing the act as the person who actually does the deed.

I charge you as a matter of law that the wilful importation of importation as alleged in Counts 2 and 4, and the wilful possession of heroin with the ultimate intention of distributing the same, as alleged in Counts 3 and 5, constitute violations of the statutes of the United States. So if you find that any defendant was a wilful member of the conspiracy and had become so before those crimes are alleged to have been committed and that Mastantuono was also a member thereof and imported and possessed the heroin in the manner charged in the counts I just mentioned, and did so in furtherance of the conspiracy, and that such conduct was reasonably foreseeable by the particular defendant whose guilt you are considering, you may convict such defendant of any or all of Counts 2, 3, 4, and 5.

You will note that I have not mentioned the fact that three of the defendants are claimed to have directly participated in the activities described in

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Counts 3 and 5, that is, the possession counts. That is a circumstance you may take into consideration, but it is not a necessary element in the crime under the theory upon which I am submitting the case to you. Under that theory those three defendants are in precisely the same situation as is the defendant Joseph Stassi. The question as to each defendant, including Stassi, is: Was he a member of the conspiracy? Was Mastantuono acting in furtherance thereof? Did the defendant whose guilt you are considering reasonably anticipate that someone, not necessarily Mastantuono, would take such action in furtherance of the conspiracy.

Now that, ladies and gentlemen, is the law that I think is applicable to the matters which you have to decide.

I am now going to excuse you while counsel for either side has an opportunity to make suggestions or corrections. Then I am going to give you some housekeeping details, in any event, whether or not I make any corrections, and I will send you back to begin your deliberations.

So, as I told you earlier, this is the last time I shall ask you -- but keep it in mind -- not to discuss this case or anything about it until I send you

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back finally in a few minutes.

Will the alternates when they come back bring with them their personal effects or anything they may have in the jury room so that you won't have to go back to the jury room when the jury is committed to the Marshal.

You may retire.

(Jury excused.)

MR. GARLAND: May it please the Court, I continue to be troubled by the whole proposition of the items in the deal, particularly Perna, that your Honor commented about. I think that your Honor's charge includes in part some correct view, but also by mentioning Mr. Nesland in substitution for the Government does one thing, it puts before the jury and the question in their minds does Nesland want the truth. What is in issue here is what Perna thinks the Government thinks the truth is and how that agreement may affect his determination of what he says in so far as it affects what he thinks the Government will think the truth is. I know that sounds a little garbled, but the question is, what is the effect on his thoughts as to what he thinks the Government will believe. So you have the consideration of, one, does he think that the Government wants the truth; two, does he think that the Government will believe that what he says is the

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STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 2 day of July 197 deponent served the within Appendix upon:

U.S. Atty. So. Dist. of N.Y.

attorney(s) for
Appellee

in this action, at
1 St. Andrews Pl, NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 2
day of July, 197

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977